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MASSACHUSETTS REPORTS

125

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE — NOVEMBER, 1878

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03

JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.
HON. JAMES D. COLT.
HON. SETH AMES.
HON. MARCUS MORTON.
HON. WILLIAM C. ENDICOTT.
HON. OTIS P. LORD.
HON. AUGUSTUS L. SOULE.

ATTORNEY GENERAL.

HON. CHARLES R. TRAIN.

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For the sake of securing greater promptness of publication, the Reporter has printed the cases in the order of decision, without reference to terms of court; and has indicated, in a line at the head of each case, the county in which it arose, the dates of the argument and judgment, and the judges present. When only one date is so given, the case was argued and determined on the same day.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

OLD COLONY RAILROAD COMPANY *vs.* CHARLES MILLER.

Barnstable. January 23, 1877; January 22. — June 28, 1878.

If a railroad corporation takes by its location the exclusive use of a piece of land, leaving other land of the owner on each side of the railroad, he is entitled to damages, with interest from the date of the filing of the location; and the fact that, when the road is constructed, suitable provision is made for the owner to cross and recross the location from one part of his remaining land to the other, and for the drainage and flowage of the part of his land which is cut off, and that he accepts the same and uses it with the understanding between himself and the company that he has a right so to do, is inadmissible in reduction of the damages.

PETITION to the Superior Court, alleging that the petitioner was aggrieved by an award of the county commissioners, allowing $875 as damages caused by the location and construction of the petitioner's railroad over the land of the respondent in Falmouth; and praying for a jury to assess such damages. Trial before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The location of the railroad crossed the respondent's farm, cutting off between three and four acres of it, to which he had no access except by crossing the location. The railroad was constructed in the spring of 1872, and the petitioner then built a fence on each side of the location, put up bar-ways and put down

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planks between the rails of the track, and there was no evidence that this did not afford the respondent a convenient means of crossing and recrossing the location between the portions of his farm thus separated. There was evidence tending to show that the respondent used this provision for crossing and recrossing, from the time it was so made continuously until the trial, as of right. The railroad location also crossed the respondent's cranberry bog, leaving about three acres of it above the location, which, for purposes of cultivation, it was necessary should be flowed and drained from below the location, and which had no drainage or flowage except through the embankment.

At the time of the construction of the railroad, provision for such flowage and drainage was made by the petitioner by putting in a culvert on land immediately adjoining the petitioner's land, through the embankment, and cutting ditches along the upper side thereof, to conduct the water to such culvert.

There was also evidence tending to show that the respondent had used such provision, and had put in a dam across the upper end of the culvert on the location, to hold back the water, and thus flow the upper part of the bog, which dam was in use at the time of the trial; but, as to the sufficiency of this culvert for the purpose of draining the bog, the evidence was contradictory.

The petitioner requested the judge to instruct the jury that if they found that, when the petitioner constructed its road through the respondent's land, it made suitable provision for the respondent to cross and recross the location from one part of his farm to the other, or for the drainage and flowage of the upper portion of his cranberry bog, and he had accepted the same and used it, with the understanding between himself and the petitioner that he had a right so to do, they might consider that fact in estimating the damages caused by taking the respondent's land.

The judge declined to give this instruction; but instructed the jury that, no right of crossing the location, or of flowing or draining the upper portion of the cranberry bog through the location, being shown to have been reserved, and thus assured to the respondent, his right of crossing the location and of flowing and draining the upper part of the bog had been taken away from him, and damages must be assessed for such deprivation, irre-

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spective of any temporary use by or advantage to the respondent from the culvert and crossing; and that the respondent was entitled to recover interest at the rate of six per cent. upon the damages found, from the time the petitioner entered upon the land by any act affecting the owner's use of it. This instruction in the matter of interest was excepted to by the petitioner as not covering a request for instructions by the petitioner, that the respondent's use of the culvert and crossing might be considered by the jury in reduction of interest and damages.

The jury assessed damages to the respondent in the sum of $3006.69; and the petitioner alleged exceptions, which were argued in January, 1877, and reargued in January, 1878.

G. Marston & J. H. Benton, Jr., for the petitioner.

T. M. Stetson, for the respondent.

COLT, J. The right of the landowner to damages for land taken by a railroad corporation is complete when the location is made. That act constitutes the taking. It is the loss occasioned by the exercise of the right of eminent domain at that time, for which the statutes provide indemnity. The amount is then due, and, if agreed upon by the parties, must be then paid. If not agreed on, the damages are assessed by a jury on the application of either party; but they are assessed as of the time of the location, and the jury may properly allow interest upon the amount ascertained as damages, for the detention of the money from the time of the taking. The damages are to be assessed in the manner, and upon the same proceedings, as is provided for the recovery of damages in the laying out of highways. Gen. Sts. *c.* 63, §§ 21, 22.

In the case of *Parks* v. *Boston*, 15 Pick. 198, 208, the jury, in a highway case, were told that the plaintiff was entitled to recover the value of the land at the time when it was taken, with interest from that time, subject to reasonable deduction for benefits to him caused by the widening; and Chief Justice Shaw declared that "it is not, strictly speaking, an action for damages; but rather a valuation or appraisement of an incumbrance created on the plaintiff's estate, for the use of the public. It is the purchase of a public easement, the consideration for which is settled by such appraisement only because the parties are unable to agree upon it. The true rule would be, as in the case of other

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purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And, if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest." See also *Reed* v. *Hanover Branch Railroad*, 105 Mass. 303, 305; *Ham* v. *Salem*, 100 Mass. 350; *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1, 5; *Edmands* v. *Boston*, 108 Mass. 535, 550; *First Baptist Society* v. *Fall River*, 119 Mass. 95. And this is the rule in other states and in England. *Bangor & Piscataquis Railroad* v. *McComb*, 60 Maine, 290. *Railroad* v. *Gesner*, 20 Penn. St. 240. *Delaware, Lackawanna & Western Railroad* v. *Burson*, 61 Penn. St. 369. *Rhys* v. *Dare Valley Railway*, L. R. 19 Eq. 93.

The instruction in the case at bar, that the landowner was entitled to interest upon the damages found, from the time the company entered upon the land by any act affecting the owner's use of it, was sufficiently favorable to the railroad corporation, if indeed there was any exception to that part of the instruction.

The other question raised relates to the refusal of the court to instruct the jury that they were bound to take into consideration certain benefits which the landowner had enjoyed in the use of the land by him since the location was filed.

It appeared that the railroad crossed the respondent's cranberry bog upon an embankment through which an opening was made for drainage. The company built a culvert on adjoining land, and dug ditches to it by the side of the embankment, in order to provide for such drainage. They also built bar-ways and laid planks for a crossing. There was evidence that the respondent used these provisions for crossing and for drainage. The railroad corporation contended that the jury should be required to take into consideration, in reduction of damages and interest, this use by the respondent. But the judge properly declined so to instruct them.

No right of crossing or of drainage was reserved in the original location filed by the company, or ordered by the county commis-

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sioners under the provisions of the Gen. Sts. *c.* 63, § 40. The right to the exclusive use of the land taken was acquired by the location. The title to such exclusive use was then vested in the company; the value of such title was the measure of the landowner's damages; and the money to be paid for it was due then, though the amount could not then be ascertained. The fact that the respondent had used these privileges cannot be availed of to diminish his claim for damages, or to change the rule which allows him interest for the detention of the money. Such use was merely permissive and subject to the paramount right of the railroad corporation. Interest is given as a lawful incident of the purchase money from the time it is first due, namely, the date of the taking, and as declared by Strong, J., in *Philadelphia* v. *Dyer*, 41 Penn. St. 463, 470, "Delay of payment is not the less an injury, because the landowner may continue the occupation of the land."

It is unnecessary to decide what might be the effect of an express agreement between the parties, that such benefits received should go in reduction of damages. The case does not disclose any evidence of any such agreement, or of any understanding that the landowner had a right to such benefits. The subsequent dealings of the parties in the use of this land or in other respects, where there has been no release or settlement, cannot affect the vested right. In *White* v. *Boston & Providence Railroad*, 6 Cush. 420, the landowner was not permitted to show that the way legally reserved to him had not been made for his use. In *Brown* v. *Worcester*, 13 Gray, 31, the defendant was not permitted to avail itself of a permission given to the plaintiff to keep his house on the location until he had occasion to rebuild or remove it. In *Dickenson* v. *Fitchburg*, 13 Gray, 546, evidence that land taken for a highway had since been laid out as a sidewalk was held inadmissible in reduction of the owner's damages. See also *Cobb* v. *Boston*, 109 Mass. 438, and 112 Mass. 181; *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1.

If either party has suffered injury or acquired rights in such subsequent dealings, the remedy for such injury or the enforcement of those rights must be had in some other form of proceeding. To hold otherwise would be to allow the railroad corporation to establish a set-off in a case where it could not be prop-

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erly pleaded or tried, and to raise new issues to the embarrassment of a trial where the only question is as to damages for the land taken and for the detention of the money.

Besides, if benefits subsequently received were allowed to diminish the damages to be awarded, the question submitted to the jury would be different from that which is previously passed upon by the county commissioners; and the landowner might be unjustly subjected to costs for failing to recover a greater amount than was previously awarded and tendered. Such could not have been the intention of our statute which gives to the trial before the jury the nature of an appeal from the county commissioners, and subjects the petitioner to costs if he fails to recover as much as was previously awarded. Gen. Sts. *c.* 63, §§ 21, 22, 35.

The case of *Pinkerton* v. *Boston & Albany Railroad*, 109 Mass. 527, 536, is cited by the petitioner as opposed to these results. But we do not understand it to have been decided in that case that a release even of part of the land, if tendered to the landowner and not accepted, could be considered in reduction of damages. The point decided was, that a conditional abandonment of location, not accepted, would be no bar to a petition for an assessment of damages. This was a full answer to the point made by the respondent, although it was said in addition that the rights of the respondent were sufficiently protected by the ruling that this attempt to abandon was proper for the consideration of the jury in mitigation of damages. To this ruling in the respondent's favor no exception was taken, and no decision upon it was called for. It would seem that subsequent changes in the relations of the parties, at least short of an unqualified abandonment of a location which has never been entered upon, or of a release or settlement of the claim, cannot be availed of to bar the proceedings, or to increase or diminish the damages to be awarded.

A majority of the court is of opinion that in the case at bar the entry must be *Exceptions overruled.*

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WATSON BAKER *vs.* ADELINE BAKER.

Barnstable. Jan. 22.—June 29, 1878. ENDICOTT & SOULE, JJ., absent.

The officer's return on a levy of execution upon land is, as against the judgment debtor, conclusive evidence of the competency of the appraisers.

The officer's return on a levy of execution upon two lots of land described them, by reference to the appraisers' certificate, as owned in severalty by the judgment debtor, (whereas in fact his interest was an undivided half as tenant in common with another person,) and as bounded by a road and by land of persons named and as containing one about five acres and the other as containing two acres. In a writ of entry, brought by the judgment debtor against a person to whom the judgment creditor had conveyed one half of the two lots of land, the debtor contended that the levy was void because it failed to describe the land levied upon and the debtor's interest therein as required by law; and offered evidence that the lot described as containing "about five acres," contained twenty acres, and that the lot described as containing "two acres" contained eight acres; and that, at the time of the levy, the creditor, the officer and the appraisers supposed that the debtor owned but one quarter part of each lot, and intended to appraise that interest only. *Held*, that the levy sufficiently described the land; and that the evidence was inadmissible.

WRIT OF ENTRY, dated September 30, 1876, to recover three undivided fourth parts of certain lands in Dennis. Plea, *nul disseisin*.

At the trial in the Superior Court, before *Aldrich*, J., without a jury, it was admitted that on September 29, 1863, the demandant was the owner of two undivided fourth parts only of the demanded premises, and that on February 26, 1870, he became the owner of another undivided fourth part of the same.

The tenant, to show her title to two undivided fourth parts of the demanded premises, offered in evidence the levy of an execution in favor of the Bank of Cape Cod against the demandant, made on September 29, 1863, and a warranty deed from the bank to her.

The appraisers' certificate, on the levy of execution, was as follows: "We, the subscribers, having been first duly chosen and sworn, as above certified, faithfully and impartially to appraise such real estate as should be shown to us as taken by force of this execution, proceeded with the officer, Edward Thacher, to view and examine so far as necessary to form a just estimate of its value, the following described real estate situated in Dennis, in the county of Barnstable, shown to us by the within named

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creditor as the estate of the within named Watson Baker the debtor, to wit: a tract of woodland and brush land called the clay-pit lot, and bounded on the north by the road to Edward Sears's, easterly by heirs of Samuel Chase and others, southerly by heirs of Reuben Baker and westerly by heirs of Rosanna Small, containing about five acres, and we have appraised said tract at the sum of one hundred and twenty-five dollars. Also another piece of woodland called Desire's lot, bounded west by land of Ahira Kelley and others, north by land of heirs of Eleazer Nickerson, easterly by land of Miller W. Nickerson and heirs of Eleazer Nickerson, south by land of Obed Baker, containing about two acres; and we have appraised said tract at the sum of thirty dollars. And we have set off all the parcels of land aforesaid by metes and bounds to the within named corporation, the President, Directors and Company of the Bank of Cape Cod, to hold to them and their assigns forever as an estate in fee simple and at the price above specified."

So much of the officer's return as is now material set forth that, by virtue of the execution, he seized "the real estate described in the foregoing certificate of the appraisers, the same having been attached on mesne process in the suit in which this execution was issued, and afterwards, on the twelfth day of October, 1863, proceeding with the levy, I caused three disinterested and discreet men to be sworn as appraisers as above, to wit: Miller W. Nickerson, who was appointed by the within named corporation the creditor, Marshall S. Underwood, who was appointed by me, and Alpheus Baker, who was appointed by me for the within named Watson Baker the debtor; said debtor being absent from and not a resident of this state and having no agent or attorney known to me." "And I this day levied this execution on said real estate described as aforesaid and delivered seisin and possession thereof to George A. King, agent and attorney of said corporation, the creditor, to hold to said corporation and its assigns forever, in part satisfaction of this execution as aforesaid."

The warranty deed from the bank to the tenant was of one half of Desire's lot and of the clay-pit lot, the metes and bounds of which were set forth and described as in the appraisers' certificate.

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The demandant asked the judge to rule that the levy was void, so far as the demanded premises were concerned, because it failed to describe the land levied upon, and the debtor's interest therein as required by law. But the judge refused so to rule.

The demandant offered to prove that the appraiser chosen by the bank and the appraiser chosen by the officer were, at the time of such appointment and while acting as such appraisers, stockholders in the Bank of Cape Cod, the execution creditor, and that this fact was known to the bank at the time of said appointments and during their action as appraisers.

The demandant also offered to prove that the clay-pit lot, so called, contained, as bounded in the appraisers' certificate, twenty acres, and Desire's lot, so called, as so bounded, eight acres; and that, at the time of the levy, the bank, the officer and the appraisers supposed that the demandant owned but one undivided fourth part of the demanded premises, and that with the knowledge of and in accordance with the intentions of all parties in interest, but one fourth part of each of the lots was appraised and applied in satisfaction of the execution. The judge ruled that the evidence offered was inadmissible; and ordered judgment for the demandant for one undivided fourth part of the demanded premises only. The demandant alleged exceptions.

J. M. Day, for the demandant.

H. P. Harriman, for the tenant.

AMES, J. It is well settled that the return of an officer, as to all matters which are properly the subject of his return, is conclusive so far as it affects parties and privies to the process returned. *Slayton* v. *Chester*, 4 Mass. 478. *Bott* v. *Burnell*, 11 Mass. 163. *Bean* v. *Parker*, 17 Mass. 591. *Campbell* v. *Webster*, 15 Gray, 28. *Chappell* v. *Hunt*, 8 Gray, 427. *Smith* v. *Randall*, 1 Allen, 456. *Hannum* v. *Tourtellott*, 10 Allen, 494. Under this rule, as the demandant was himself the judgment debtor in the execution, upon which the title to the demanded premises depends, the objection that the appraisers were disqualified for the reason that they were not disinterested persons is one of which he cannot avail himself in this action.

The levy of an execution upon real estate, when conducted in conformity to law, operates as a kind of statute conveyance from the debtor to the creditor. Its effect, under the St. of 1783, *c.* 57,

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§ 2, was to make as good a title to the creditor, his heirs and assigns as the debtor had therein. *Bartlet* v. *Harlow*, 12 Mass. 347. In the language of the statute now in force, "all the freehold estate and interest which the debtor has in the premises shall be taken and pass by the levy, unless it is a larger estate than is mentioned in said description" indorsed on the execution. Gen. Sts. *c.* 103, § 8. The land levied upon by virtue of the execution is described by metes and bounds, and is identified with as much precision as is necessary in a common conveyance of land, which is all that the statute requires. Gen. Sts. *c.* 103, § 5. There can be no doubt that the description contained in the return of the execution is to be interpreted upon the same rules and principles that would govern if applied to the same language contained in an ordinary deed of conveyance. It is well settled that known monuments referred to as boundaries must govern, although neither courses nor distances nor the computed contents correspond with such boundaries. *Davis* v. *Rainsford*, 17 Mass. 207. *Dana* v. *Middlesex Bank*, 10 Met. 250. A boundary on the land of a person named, even though there be no visible monument or enclosure, has all the controlling effect of an actual monument in limiting the extent of the grant. *Curtis* v. *Francis*, 9 Cush. 427, 438. If the lot is otherwise described with sufficient certainty, a considerable mistake as to the number of acres would be immaterial. *Clark* v. *Munyan*, 22 Pick. 410. *Worthington* v. *Hylyer*, 4 Mass. 196. The lot appraised and set off in the execution is therefore identified with sufficient precision.

The only objection to the levy in this case is, that it purports to be upon the entire lot as if held in severalty, when the judgment debtor in fact had only an undivided fractional interest in it, and was a tenant in common with some other person or persons. But it has been repeatedly held that this is not a valid objection. Thus in *Atkins* v. *Bean*, 14 Mass. 404, it was held that the extent of an execution, purporting to be upon an undivided seventh part of a lot of land, was valid to pass the debtor's title as tenant in common, although it proved to be an undivided eighth part only. The court said: "If one conveys by deed more land than he owns, the deed is good for what he does own. So, if an execution be levied upon one hundred acres,

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and the debtor had a title but to fifty, the levy is good for the fifty." Such a mistake prejudices no one but the creditor. It is enough that the whole estate was appraised and set off at the appraisal. *Mechanics Bank* v. *Williams*, 17 Pick. 438. The debtor cannot say that more of his property has been applied to the execution than might fairly be so applied, or that the appraisal has subjected him to any hardship. *Root* v. *Colton*, 1 Met. 345.

The ruling of the court was therefore correct, and the demandant's *Exceptions are overruled.*

TIMOTHY BRESNIHAN *vs.* JOHN SHEEHAN & another.

Norfolk. Jan. 25, 1877. — June 27, 1878. MORTON, ENDICOTT & SOULE, JJ., absent.

If a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposit with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which, in payment of his debt, a creditor of the husband may, under the Gen. Sts. *c.* 113, § 2, *cl.* 11, maintain a bill in equity against him and his wife.

BILL IN EQUITY, under the Gen. Sts. *c.* 113, § 2, against John Sheehan and Ellen Sheehan, his wife. Ellen Sheehan demurred for want of equity. Hearing upon the bill and demurrer, before *Ames*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

E. C. Bumpus, for Ellen Sheehan.

W. E. Jewell, for the plaintiff.

COLT, J. Under our statute, a creditor may maintain a bill in equity to reach and apply in payment of his debt any property, right, title or interest, legal or equitable, of a debtor which cannot be come at to be attached or taken on execution. Gen. Sts. *c.* 113, § 2, *cl.* 11. A creditor may thus reach the equitable assets of his debtor, without having exhausted his remedies at law or reduced his claim to a judgment. *Tucker* v. *McDonald*, 105 Mass. 423. He may enforce in his own name and for his own benefit, to the extent of his interest as creditor, the equitable

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title of his debtor to any property, real or personal, within the jurisdiction of the court, which cannot be taken on execution.

This bill is brought against husband and wife by a creditor of the husband. The plaintiff alleges that the husband deposited all his wages with the wife for safe keeping; that the latter, without the husband's knowledge, deposited the same in a savings bank, from time to time, and, without his knowledge or assent, used the amount so deposited, together with some money she had borrowed on her sole credit, in payment for certain real estate, the title to which she took and still holds in her own name. It is not alleged that this was done by the wife with any purpose on her part of aiding her husband to delay or defraud his creditors.

The prayer of the bill is that the property of the husband, thus appropriated by the wife, may be applied to the payment of the plaintiff's debt, and, to that end, that the land may be conveyed to a receiver to sell the same or so much of the same as may be necessary.

In support of the demurrer, it is contended that the plaintiff has no remedy against the land in question, either at law or in equity. It is clear that the land cannot at law be attached, or taken on execution, as the property of the husband. It has been recently decided that when land was conveyed to the wife, which was paid for in part by the husband and in part by the wife, without any participation by the latter in the fraudulent intent of the husband to defraud his creditors, the same could not be reached under the Gen. Sts. *c.* 103, § 1, which authorize a creditor to levy on land fraudulently conveyed or paid for by the debtor the record title to which is in another. In the case referred to, the debtor, with a purpose to defraud his creditors, paid part of the purchase money, and his wife innocently paid the rest and took the title in her own name. It was held that the equitable interest of the debtor, if any, which arose from his part payment of the purchase money, could not be reached by the levy of an execution. *Snow* v. *Paine*, 114 Mass. 520.

Nor, upon the facts alleged, does this land come within the other description named in the statute last cited, namely, that of land purchased, or directly or indirectly paid for, by the debtor, the title to which is conveyed to a third person, on a trust for

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him, express or implied, whereby he is entitled to a present conveyance. A resulting trust is not created in favor of one who pays directly or indirectly part of the purchase money for land conveyed to another, unless such payment is made for some specific or distinct portion of the estate. *McGowan* v. *McGowan*, 14 Gray, 119. *Snow* v. *Paine*, above cited. The money here appropriated by the wife was used with her own money, in a general payment towards the entire purchase, and the husband was not entitled, at law or in equity, to a present conveyance of the whole or of any distinct or aliquot portion of the whole.

The plaintiff's claim is that the husband has an equitable interest which may be reached and applied, under the statute first cited, by a decree in his favor. The money of the husband was deposited with the wife for safe keeping; she held it as bailee in trust for him. It was a breach of that trust, and a fraud upon him, for her to use it without his knowledge in the purchase of real estate, and he has a right, at his election, by proper proceeding in equity, to charge the land so purchased and held by her, to the extent of the money so wrongfully appropriated. The practical difficulty, in cases where a misappropriation of money is charged, arises from the difficulty of identifying and following it in its changed conditions into other property. But, in the language of Lord Ellenborough, in a well considered case, "the difficulty which arises in such case is a difficulty of fact and not of law, and the dictum, that money has no ear-mark, must be understood as predicated only of an undivided and undistinguishable mass of current money," and not of "money in a bag, or otherwise kept apart from other money." *Taylor* v. *Plumer*, 3 M. & S. 562, 575. And it was declared by Gibson, J., in *Wallace* v. *Duffield*, 2 S. & R. 521, that it was certainly law, that money, although it had no ear-mark, might be followed into the land where it had been invested, in cases where the purchaser stood as trustee in relation to the fund. The trustee in such case ought not to be permitted to defeat the claim upon the land, so long as he continues to hold the title, by proving only that he contributed to the purchase money and mingled his own money with the money of the plaintiff. *Deg* v. *Deg*, 2 P. Wms. 412.

These doctrines have been recognized in many American cases. In *Day* v. *Roth*, 18 N. Y. 448, the plaintiff's money,

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held by one of the defendants for investment on her account, was invested in land, which was conveyed to the other defendant with knowledge that the money was so misappropriated. The plaintiff's money was part only of the whole sum paid in the purchase and improvement of the land. It was declared that the fund was impressed with the characteristics of a trust, and that the plaintiff had the right to follow and claim it, so long as she could trace its identity, into whatsoever hands it might be transferred, and to charge it upon any man's estate in which she might find it invested, who was not an innocent purchaser; that the estate was chargeable with an equitable lien in her favor in the nature of a resulting trust; and that she was entitled to a judgment for a sale of the property as upon foreclosure, in default of payment within a time named.

In *McLarren* v. *Brewer*, 51 Maine, 402, it was declared to be the settled doctrine, both in law and equity, that a mere change of property from one form to another cannot divest the owner of his property in it so long as it is capable of identification; and that money itself may be so followed.

In *Wallace* v. *Duffield*, above cited, it was said by Gibson, J., that when a trustee purchases with the trust fund and takes the conveyance in his own name, there is properly speaking no resulting trust, though it is usually called so; for there is in equity a very substantial difference between them, both in the quality and extent of the relief that can be called for. In the former, the trustee will be compelled to execute the trust by a conveyance of the land. In the latter, chancery will raise the money out of the land by a sale of the whole, or such part of it as may be necessary to produce the sum withdrawn; and this mode is peculiarly convenient where only part of the consideration has been taken from the trust fund. See also *Cheney* v. *Gleason*, 117 Mass. 557; *Oliver* v. *Piatt*, 3 How. 333; *Kirkpatrick* v. *M'Donald*, 11 Penn. St. 387; Adams Eq. 33, note; 2 Story Eq. Jur. §§ 1258, 1259.

In the law of agency, the doctrine is more frequently applied, and, when the money of the principal has been wrongfully invested by the agent in land, equity will follow it into the land, and hold the legal owner, charged with notice, trustee for the benefit of him whose money has been so invested. Story Agency, § 229.

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In the case at bar, upon the facts stated in the bill, the husband has an equitable lien upon the land conveyed to and now held by the wife. It is a valuable interest which cannot be come at to be attached or taken on execution. *Robinson* v. *Trofitter*, 109 Mass. 478. It may therefore, under the statute, be reached and applied by the plaintiff to the payment of his debt, by bill in equity. *Demurrer overruled.*

INHABITANTS OF EGREMONT *vs.* JOSEPH A. BENJAMIN & others.

Berkshire. Sept. 12, 1877. — July 17, 1878. ENDICOTT & LORD, JJ., absent.

Although the sureties on the bond of a town treasurer are not liable for any default on his part which occurred during a previous term of office, where the bond recites that he has been chosen for the current year, and contains the condition merely that he shall faithfully discharge the legal duties of his office, yet if the treasurer, at the beginning of the year for which the bond was given, reports a balance due from him for the preceding year, and subsequently charges himself with amounts collected by him during the year, and credits himself with money paid by him on account of the town, such credits, in an action against the sureties on the bond, may first be applied to the payment of the balance due at the beginning of the year, although the treasurer had, prior to that time, converted such money to his own use.

In an action against the sureties on a bond given by a town treasurer for the faithful discharge of his official duties, it was admitted that there was a breach of the bond, and that execution should issue for a certain amount. The defendants contended that a certain other amount should not be included in the execution, because there had been no formal demand on the treasurer before bringing the action. It appeared that the town, at the expiration of the treasurer's term of office, appointed a committee to settle with him; that such committee made a report to the town, showing a certain balance due from the treasurer, which report was accepted; and that the treasurer turned over his official books and accounts and a sum of money to his successor. *Held*, that the unpaid balance in the hands of the officer was due immediately on the expiration of his term of office; and that no formal demand on the part of the town was necessary.

CONTRACT on a bond, for $10,000, signed by the first named defendant as principal, and the others as sureties, dated March 29, 1875, and containing the following condition: "The condition of this obligation is such that whereas the said Joseph A. Benjamin has been chosen treasurer and collector of taxes for

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said town of Egremont for the current year, and accepted said offices, and been duly sworn to the faithful discharge of the duties thereof respectively; now if the said Joseph A. Benjamin shall, as treasurer and collector as aforesaid, faithfully collect, account for and pay over all the taxes he shall be legally required to collect, and also faithfully discharge all other legal duties of said offices, then this obligation shall be void, otherwise to remain in full force and virtue." Writ dated May 18, 1876. Trial in the Superior Court, without a jury, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

It was admitted that there had been a breach of the bond, owing to the failure of the defendant Benjamin, as collector of taxes, to pay to the treasurer of the county of Berkshire the sum of $1102.94, as directed by the assessors of the plaintiff town, in their warrant to him as collector of taxes; and that judgment should be entered for the plaintiff for the penalty of the bond, and execution awarded for the damages growing out of that breach.

It appeared that Benjamin, who died in 1876, after the commencement of the suit, had held for several years prior to March 29, 1875, the offices of treasurer and collector of taxes, and had given bonds with sureties, other than those on the bond in suit, for the faithful discharge of his official duties in those years; that at the annual town meeting on March 29, 1875, Benjamin reported to the town the condition of the treasury for the year ending on that day, showing a balance due from him as treasurer of $797.12; and, as the first item of his account as treasurer for 1875, charged himself with this balance, and then with various sums received during the year, and with the whole amount of taxes committed to him as collector for 1875, except the county tax, and credited himself from time to time with money paid by him on orders drawn by the selectmen, to an amount of between $3000 and $4000.

The sureties offered evidence tending to prove that on March 29, 1875, Benjamin had not, in fact, in his hands as treasurer, the sum of $797.12, even though he ought to have had that sum in his hands as a balance due from him, as treasurer, to the town; but that he had, prior to that day, mingled it with his own moneys, using it and converting it to his own business. But

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the judge held that it would not be competent to find, upon the evidence offered, a misappropriation of the money previous to March 29, 1875, and ruled that the evidence was immaterial.

At the annual town meeting on March 20, 1876, a committee was appointed to settle with Benjamin as treasurer. This committee reported at an adjourned meeting held on April 10, 1876, and their report, which showed a balance due from Benjamin, was accepted by the town. On the following day, Benjamin handed over to his successor in the office of treasurer the tax lists of 1874 and 1875, in each of which there were uncollected taxes, and also his account book as treasurer, and paid to his successor the sum of $64.

The defendants asked the judge to rule as follows:

"1. The sureties of Benjamin, as treasurer for the year 1875, are liable only for moneys that were in his hands as treasurer on March 29, 1875, or received by him as treasurer subsequently thereto; but they are not liable for moneys reported by him on March 29, 1875, as in his hands as treasurer, but which in fact had been converted to his own use, and not actually in his hands on that day.

"2. If Benjamin did not keep the money of the town separate from his private funds, but allowed the moneys officially received to be mingled with his private funds, and to be used in his private business, such mingling and use would be a conversion of the public funds, and the sureties for 1875 would not be responsible for moneys so converted prior to March 29, 1875.

"3. In order to maintain this action for moneys in the hands of Benjamin as treasurer, a demand on Benjamin should have been made before suit; and if no such demand was made, then the amount in his hands as treasurer should not be included in the amount of damages for which execution should issue in this case."

But the judge refused to rule as requested; ruled that a demand was not necessary, and ordered an execution to issue in the sum of $2953.99, which sum included damages for the non-payment of the county tax, and moneys due from Benjamin as treasurer, including the sum of $797.12. The defendants alleged exceptions.

M. Wilcox, for the defendants.

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J. Dewey, for the plaintiff.

SOULE, J. The sureties on the bond of an officer, which recites that he has been chosen "for the current year," with condition merely that he "shall faithfully collect, account for and pay over all the taxes he shall be legally required to collect, and also faithfully discharge all other legal duties of said offices," are not liable for any failure of duty which occurred during a term of office previous to that for which the bond is given, nor for any default or misfeasance in any subsequent term for which the principal may be elected. *Lexington & West Cambridge Railroad* v. *Elwell*, 8 Allen, 371. *Amherst Bank* v. *Root*, 2 Met. 522.

If, however, such officer applies moneys, received during the term covered by the bond, to the payment of arrearages of a previous term, and the corporation, municipal or trading, whose servant he is, receives such moneys in good faith, without knowledge of any purpose on his part to defraud the sureties on his bond, such sureties are liable for the deficiency in the funds of the year covered by the bond, which results from such application of the moneys received. And when moneys are paid to the corporation by an officer with whom is an open account, running back into a previous term, and he makes no application of the payment to a particular part of his debt, such payment goes to the extinguishment of the earliest items. *Colerain* v. *Bell*, 9 Met. 499. *Sandwich* v. *Fish*, 2 Gray, 298. *Gwynne* v. *Burnell*, 6 Bing. N. C. 453. *Attorney General* v. *Manderson*, 12 Jur. 383.

In the case at bar, it appears that the defendant Benjamin, the treasurer and collector of the town, made a report at the meeting of March 29, 1875, showing a balance due from him, as treasurer, to the town, of $797.12, and that the first entry in his account as treasurer, for the year covered by the bond in suit, was a charge to himself of that balance. In the absence of proof to the contrary, it is to be presumed that he had that amount of money on hand, subject to the call of the town, and that no objection exists to the charge going into his account. It is contended, however, that the judge, who tried the case without a jury, ought to have excluded this balance in making up the amount for which execution should be awarded against the sureties on the bond, on the ground that, under the evidence

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offered, they were entitled to a ruling that, as to this balance, the treasurer had become a defaulter during the previous fiscal year, and had not had the moneys represented by that balance in his hands since their bond was executed. The evidence offered tended to prove that he had not the money in hand, as money set apart for the town, but had mingled it with his own moneys, and had used it and converted it to his own business. It is apparent that the treasurer had not been wont to deposit moneys received by him officially with a bank, to the credit of the town, and to draw, as treasurer, against such deposit, in order to make the payments required of him from time to time, but had simply kept an account between himself and the town, which showed the amount due from him at all times. For that amount he was a debtor merely, bound to pay it over whenever it should be called for in due course of business during his term of office, and, at the expiration of his term, to pay it to his successor. He was not a bailee of the moneys received, but an accountant, bound to pay over an amount equal to what he had received, precisely as a collector of taxes is a debtor and accountant, bound to pay to the treasurer the moneys which he receives. *Hancock* v. *Hazzard*, 12 Cush. 112. The liability of the sureties for the amount of the balance due March 29, 1875, is not determined by the manner in which the treasurer had used the moneys represented by that balance, but by the fact that he had used the moneys subsequently received in payment of that balance, under such circumstances that they were, as between him and the town, applicable to the extinguishment of the earliest items of the account between him and the town, according to the doctrine of the cases above cited. The evidence offered as to his previous use of the money received before March 29, 1875, was therefore immaterial, and the rulings asked for, based on that evidence, were properly refused.

It is conceded that the plaintiff is entitled to judgment, and to execution for the amount of the county tax; but the defendants insist that there was no breach as to any other moneys contended for in the suit, because no demand was made on Benjamin before suit was begun. It appears that the term of office for which the bond was given had expired, that a committee was appointed to settle with Benjamin, and made a report to the

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town, which was accepted, after which Benjamin turned over the tax lists of 1874 and 1875 to his successor, and made a small cash payment. Under these circumstances, no formal demand of payment was necessary. The unpaid balance in the hands of Benjamin was due presently on the expiration of his term of office. It was his duty to pay it over to his successor without formal demand. Moreover, the attempt at settlement through the committee of the town might well be regarded as the equivalent of a formal demand of payment. It is to be remembered that the question now under consideration does not go to the maintenance of the action, nor depend on the pleadings. It is conceded that judgment is to go for the plaintiff for the penalty of the bond. The question is only as to the amount for which execution is to issue. The amount insisted on by the plaintiff was clearly due from Benjamin, and should be included in the execution, unless there is good equitable reason to the contrary. *Hatch* v. *Attleborough*, 97 Mass. 533. Such reason we fail to find. *Exceptions overruled.*

NATIONAL MAHAIWE BANK *vs.* JAMES W. BARRY & others.

Berkshire. Sept. 11, 1877. — July 18, 1878. ENDICOTT & LORD, JJ., absent.

Equity will charge land, paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank for the amount so used.

On a bill in equity by a bank to charge land, alleged to have been paid for in part with money known to have been stolen from the bank, with a trust in its favor to the extent of the partial payment, evidence that a short time before the purchase of the land a son of the purchaser received from the thief, knowing it to have been stolen, about the amount of the partial payment; that the son was a minor, living at home with his parents, and that neither the purchaser nor her husband had sufficient means to make such payment, will warrant a decree in favor of the plaintiff.

When a case in equity comes before the full court on a bill of exceptions to the ruling of a single judge, instead of on appeal, no question of fact is open.

BILL IN EQUITY, inserted in an original writ of summons and attachment, dated April 21, 1873, against Joseph T. Barry, James W. Barry, Jane Barry and Robert Girling.

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The bill alleged that on or about October 21, 1871, William S. Hine stole over $25,000 of the plaintiff's money; that Joseph T. Barry knowingly aided Hine in the theft and received $1700 of the money so stolen; and that James W. Barry and Jane Barry, the parents of Joseph T., fraudulently conspired with him to conceal that amount from the plaintiff by giving $1500 of it in part payment of certain real estate purchased of Girling for $2500, Jane, to whom the title was conveyed on November 6, 1871, giving her promissory note for the balance of the purchase money, secured by a mortgage upon the real estate, to which James W. assented in writing.

The prayer of the bill was that Jane might be adjudged to hold the real estate in trust for the plaintiff and James W., and Jane ordered to convey the same to the plaintiff, or that the real estate might be sold and the plaintiff's claim satisfied out of the proceeds of the sale; and for general relief. The defendants, with the exception of Girling, filed answers, each containing a demurrer for want of equity.

Colt, J., overruled the demurrers; from this order the defendants appealed; and the case was then heard on the merits, before the same judge.

John E. Dodge testified that he was the president of the plaintiff bank in 1871; that on October 21, of that year, William S. Hine was employed as a clerk and bookkeeper in the bank, and on that day stole about $25,000 of the plaintiff's money and went to California with the same, and was arrested there and brought back to Great Barrington in November, 1871; that he knew the defendant, Joseph T. Barry; that he had never had any conversation with him, and knew nothing of his having had any of the stolen money; and that the plaintiff recovered of Hine between $18,000 and $19,000 of the stolen money, with a diamond ring and watch, and received nothing further.

The plaintiff then put into the case the record of an indictment against Joseph T. Barry, for larceny and for receiving a part of the money stolen by Hine, upon which he was tried and found guilty on the count for receiving stolen property, and sentenced to imprisonment in the house of correction.

The plaintiff put in the deposition of Hine, which set forth that he was teller in the plaintiff bank from 1869 to 1871, and

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at the time of the stealing of the plaintiff's money; that Joseph T. Barry had nothing to do with the taking of the money; that he gave to Joseph T. $1700 of the plaintiff's money, and he received it, knowing of the larceny; that he talked about it with the prisoners at the prison, or some of them; that he received no letter from Barry during the time he was in prison, and that he knew George B. Seeley, and was a friend of his, and was visited by Seeley while he was serving his sentence in prison.

George B. Seeley testified that Joseph T. Barry told him he had received from Hine $1500 of the bank's money, and said he supposed he was "shadowed," but promised to visit Hine in prison as soon as he could safely do so; and that he told him at one time that the money was safe, and at another time that it was hidden at Flushing, Long Island.

The plaintiff then called as a witness the defendant, James W. Barry, who testified that he was the father of Joseph T. and husband of Jane Barry; that he had lived at Great Barrington about twenty-one years, and kept a boot and shoe store there four or five years; that he was a boot and shoemaker by trade; that he failed twice while in business in Great Barrington; that he failed first in 1868 or 1869, and again in 1871; that, when he failed the first time, he compromised with his creditors at fifty cents on the dollar, his wife letting him have $800 to pay the percentage, and that was all he was able to pay his creditors; that at that time he knew his wife had property of her own; that he then continued in business till 1871, and in the mean time had paid back to his wife about $600 of the $800; that in 1871 he again failed, his stock of goods was attached and sold on a writ, the money resulting from the sale paying about fifty cents on the dollar of his indebtedness; that a policy of life insurance was pledged by him, securing twenty-five per cent. more; that in 1856 he bought a house and lot, agreeing to pay therefor $800; that he paid $50 down, and, with the assistance of his wife, finished paying for the house and lot in 1860; that in 1863 or 1864, he enlisted in the United States army, and received a bounty from the town of $300 or $350, which he gave to his wife, and also gave her all the other bounty which he received, and also his monthly pay while in the service, which amounted in all to between $900 and $1000, she also receiving

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$12 a month state aid while he was in the service; that she also received the wages for the labor of four minor children in the factory; that the oldest child in 1864 was 13 or 14 years old, and the youngest 9 or 10; that all lived at home; that in 1863 or 1864, when he went into the service, he caused the title to the homestead to be transferred to his wife, and since then the title thereof has stood in her name; that, when he was making a settlement with his creditors in 1871, he did not recollect telling Mr. Dewey that his wife had nothing aside from the homestead with which to help him pay his creditors, but he did know that his wife did then have money of her own, but he would not swear that he did not tell Mr. Dewey so; that his wife always saved money; that she kept it in her bed-room, and he knew she had it on November 6, 1871; that he was present when she paid Girling the $1500 on that day, but he did not know where she took the money from, but he saw it in Mr. Dewey's office when the deed was made; that he knew of his own knowledge that she had $1500, and knew it a year before 1871, because she was going to buy a place of one Hollister, and he went to see Hollister about buying the same; that he thought she had $2000 in money at that time; that she had been saving this money for a number of years perhaps; and that she had a pocket-book, but kept her money in a square box, he thought a tin box, where he kept his deeds, &c.

Justin Dewey, Jr., one of the counsel for the plaintiff and counsel for the creditors of James W. Barry, and who made the deed from Girling to Jane Barry, testified that he did not recollect the percentage that James W. Barry paid to his creditors; that he brought an action against said James W. in 1871, and attached his goods; that they were sold, and paid about fifty cents on the dollar; that James W. said he could not pay any more; that he asked James W. if his wife had any means to assist him, and he said no, unless she would mortgage her homestead; that he asked James W. if his wife would give a mortgage on the homestead, and he said he would go and see her, and he did go, and returned saying that she would not mortgage her homestead for fear of losing it; and that they finally agreed on a certain amount, and James W. assigned his life insurance as collateral security for a note given in settlement to make up the balance of

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seventy-five cents on the dollar, and, not being able to pay the note at maturity, forfeited the policy to the creditor.

It appeared that at the times of the conveyance, and of the larceny by Hine, and the receiving of the money by Joseph T. Barry, the latter was a minor, living at home with his parents, and was still a minor at the time of bringing this bill.

The defendants, Jane and Joseph T. Barry, were present in court during the whole of the hearing, and heard the testimony above recited. The plaintiff knew they were present and heard the same, and did not ask either of them to testify; and no further evidence was offered.

The defendants asked the judge to enter a decree dismissing the bill, contending that the evidence offered would not justify a decree for the plaintiff. The judge refused so to rule, but ruled that the evidence was sufficient to support the allegations of the bill, and ordered a decree for the plaintiff. The defendants alleged exceptions.

A. J. Waterman, for the defendants.

M. Wilcox, for the plaintiff.

GRAY, C. J. Upon the case stated in the bill, equity will charge the land purchased in the name of Mrs. Barry with a trust in favor of the plaintiff bank for the amount of $1500 of its money, which had been wrongfully obtained by her son and invested in the purchase of that land. *Bresnihan* v. *Sheehan*, *ante*, 11. *United States* v. *State Bank*, 96 U. S. 30. The demurrer was therefore rightly overruled.

The decision of the presiding judge at the hearing on the merits is not brought up by appeal under the Gen. Sts. *c.* 113, §§ 8, 10, but by bill of exceptions under *c.* 115, § 7. It is not therefore open to revision in matter of fact, and the only question before us is whether, as matter of law, the evidence introduced justified a decree for the plaintiff.

That evidence warranted the judge in inferring that the son, being a minor and living with his parents, received the money from a thief, knowing it to have been stolen from the plaintiff; that neither the son nor his parents appeared to have had any other sufficient means to make the purchase of the land from Girling; and that therefore it must have been purchased with the money of the plaintiff. Upon this state of facts, the plaintiff

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was entitled to a decree, subject, of course, to the rights of Girling (whose good faith is not questioned) under the mortgage given back to him for part of the purchase money.

Decree for the plaintiff accordingly.

HORATIO G. KNIGHT *vs.* MARY G. THAYER & others.

Hampshire. September 18, 1877. — July 18, 1878.

A warranty deed, executed by a married woman, in accordance with the power conferred upon her by the Gen. Sts. *c.* 108, § 3, of land in which a third person has a life estate at the time, who afterwards conveys it to the grantor, is binding by way of estoppel upon her and her subsequent grantees, to the same extent as if she were unmarried.

Under a deed with covenants of warranty, a title afterwards acquired by the grantor enures by way of estoppel to the grantee, as against the grantor and his subsequent grantees.

WRIT OF ENTRY, dated February 2, 1877, against Mary G. Thayer, Benjamin E. Thayer and Lucy A. Knight, to foreclose a mortgage of land in Easthampton. The two first named tenants disclaimed title to the freehold. The tenant Knight pleaded *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the demandant, to this court, on appeal, on agreed facts, in substance as follows:

The two first named tenants are husband and wife, having been married prior to any of the transactions herein stated. The other tenant is their daughter.

The demandant claimed title under a mortgage made on December 21, 1871, by Mary G. Thayer to the demandant and George H. Sprague. The conveyance was in consideration of $1000, and was subject to a prior mortgage for $1500 held by Ebenezer Ferry. The deed contained the following covenants: "And I do for myself, my heirs, executors and administrators, covenant with the said Knight and Sprague, their heirs and assigns, that I am lawfully seised in fee of the aforegranted premises; that they are free of all incumbrances, except the mortgage above stated, that I have good right to sell and convey the same to the said Knight and Sprague and that I will warrant

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and defend the same premises to the said Knight and Sprague, their heirs and assigns forever, against the lawful claims and demands of all persons." The condition was the payment of a promissory note of $1000 by the grantor on July 1, 1872. Benjamin Thayer signed the deed, and his name appeared in the testimonium clause in token of his assent, but did not appear as grantor. Sprague's interest has since been assigned to the demandant.

On May 2, 1864, Benjamin E. Thayer conveyed the land, by a mortgage deed with power of sale, to Ebenezer Ferry. On June 19, 1869, Benjamin conveyed the land to one Clark, who, on July 12 following, conveyed it to Mary G. Thayer. On August 6, 1874, Frances A. White, who is now living, and who then, and at the time of the mortgage to Ferry, had a valid life estate in the land, conveyed the same to Mary G. Thayer. On August 24, 1874, Ferry, for breach of condition in the mortgage to him, sold the land, under the power, to William G. Bassett, and executed a deed thereof to him; but neither Bassett nor any one claiming under him, has ever been in actual possession of the land. On January 1, 1875, Mary G. Thayer conveyed the premises, including the life estate, to Lucy A. Knight, as whose tenant, Benjamin is in possession. All the above mentioned deeds were recorded at or about their dates.

"Any fact or deed recited, which would not be admissible against objection, is not to be taken as admitted. When any party would be bound by the rules of law, by estoppel or rebutter, the same are to apply in the determination of this case." Such judgment is to be entered as the court shall order.

W. G. Bassett, for the demandant.

G. D. Robinson & L. E. Hitchcock, for Lucy A. Knight.

GRAY, C. J. By the common law of Massachusetts, the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or of estoppel; because she was incapable of binding herself by covenant of warranty or by agreement to convey her real estate. *Wight* v. *Shaw*, 5 Cush. 56. *Lowell* v. *Daniels*, 2 Gray, 161. *McGregor* v. *Wait*, 10 Gray, 72.

But by the Gen. Sts. *c.* 108, § 3, every married woman is made capable of bargaining, selling and conveying her separate

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real and personal property, entering into any contracts in reference to the same, and suing and being sued in all matters relating thereto, in the same manner as if she were sole, with no other restriction than being required to obtain the assent of her husband, or the approval of a judge of this or of the Superior or Probate Court, to any conveyance of shares in a corporation, or of real property, except a lease for not more than a year. Any conveyance or contract executed by a married woman in accordance with the power thus conferred is binding upon and may be enforced against her to the same extent as if she were unmarried. *Baker* v. *Hathaway*, 5 Allen, 103. *Basford* v. *Pearson*, 7 Allen, 504. *Faucett* v. *Currier*, 109 Mass. 79. *Merriam* v. *Boston, Clinton & Fitchburg Railroad*, 117 Mass. 241. *Richmond* v. *Tibbles*, 26 Iowa, 474.

It has been the settled law of this Commonwealth for nearly forty years, that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor enures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. *Somes* v. *Skinner*, 3 Pick. 52. *White* v. *Patten*, 24 Pick. 324. *Russ* v. *Alpaugh*, 118 Mass. 369, 376. We are aware that this rule, especially as applied to subsequent grantees, while followed in some states, has been criticised in others. See Rawle on Covenants, (4th ed.) 427 *& seq.* But it has been too long established and acted on in Massachusetts to be changed, except by legislation.

The necessary conclusion is that, under the mortgage with full covenants of warranty, executed by Mrs. Thayer with her husband's assent, the demandant is entitled to the demanded premises as against her and her husband, and also as against Mrs. Knight, to the extent of the interest since acquired by Mrs. Thayer and conveyed by her to Mrs. Knight.

Judgment affirmed.

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WALTER W. KENWORTHY & others *vs.* SARAH A. SAWYER.

Hampshire. Sept. 17, 1877. — July 18, 1878.

Under the St. of 1874, *c.* 184, a promissory note, made by a partnership, and indorsed by the wife of one partner for the accommodation of the firm, binds her.

An instrument under seal, given by the indorsee of a note to one of the joint makers, whereby the indorsee acknowledges the receipt of part of the amount of the note, covenants not to sue the maker to whom it is given, and reserves all rights against other parties to the note, does not discharge such parties.

CONTRACT upon a promissory note for $800, dated December 30, 1875, signed by Byron Smith and M. W. Sawyer, payable to the order of the defendant, and by her indorsed in blank. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

The makers of the note declared on were, at the time, engaged as copartners in the business of buying and selling cattle and swine. The defendant, the wife of one of the makers, indorsed the note, for the accommodation of the firm, to raise money to be used in their business. Demand was made on the makers at the maturity of the note, and notice of the non-payment duly given to the defendant.

On March 20, 1876, after the bringing of this action, Smith, one of the makers, paid the plaintiffs, by J. C. Hammond, his trustee, $360, on account of the note, and took from the plaintiffs the following receipt, signed and sealed by them: "In consideration of the sum of three hundred and sixty dollars from J. C. Hammond, trustee, from funds raised by sales of property of B. Smith and release of dower rights, we hereby covenant with J. C. Hammond, Tr. and with Byron Smith, that we will never sue for, enforce collection, or in any way or manner demand or enforce collection of the balance of said Smith's indebtedness to us. Reserving nevertheless to ourselves all rights as to other parties, whether indorser for or joint promisor with said Smith."

R. O. Dwight, for the plaintiffs.

A. A. Tyler, for the defendant.

GRAY, C. J. By the St. of 1874, *c.* 184, a married woman "may make contracts, oral and written, sealed and unsealed, in

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the same manner as if she were sole," and "may sue and be sued in the same manner and to the same extent as if she were sole" —.with this restriction only, that nothing in this act contained shall authorize a married woman to make contracts with her husband, or authorize suits between husband and wife.

This statute does not, like the Gen. Sts. *c.* 108, § 3, restrict the capacity of a married woman to make contracts, and to sue and be sued, to matters in reference to her separate property, business or earnings, but enables her to make and to be sued upon contracts of every kind with any one but her husband, as if she were unmarried. *Major* v. *Holmes*, 124 Mass. 108.

A promissory note, like any other contract, between husband and wife, or between a wife and a partnership of which her husband is a member, is void as between the original parties. *Jackson* v. *Parks*, 10 Cush. 550. *Lord* v. *Parker*, 3 Allen, 127. *Edwards* v. *Stevens*, 3 Allen, 315. A promissory note, therefore, made by a husband, or by a partnership of which he is a member, to his wife, or by a wife to her husband, will not sustain an action against the maker, either by the payee or by an indorsee. *Ingham* v. *White*, 4 Allen, 412. *Roby* v. *Phelon*, 118 Mass. 541.

But an indorser, when sued upon the contract between him and his indorsee, is not at liberty to deny the validity of the original note, or the capacity of the maker, for the purpose of defeating his own liability. *Burrill* v. *Smith*, 7 Pick. 291, 295. *State Bank* v. *Fearing*, 16 Pick. 533. *Prescott Bank* v. *Caverly*, 7 Gray, 217. *Erwin* v. *Downs*, 15 N. Y. 575. As Lord Hardwicke long ago said, "Though a note given by a wife to a husband is void, yet if it is indorsed over by the husband, as between him and the indorsee it is certainly good." *Haly* v. *Lane*, 2 Atk. 181. Since the St. of 1874 took effect, a promissory note made by a married woman to her husband, and indorsed by him, is governed by the same rules. And see *Knight* v. *Thayer*, *ante*, 25.

The consideration moving from the party who takes the note with the signatures of the maker and of the indorser is sufficient to support the promise of the latter, and the fact that the indorsement is for the accommodation of the maker affords no defence to the indorser. *Violett* v. *Patton*, 5 Cranch, 142. *Yeaton*

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v. *Bank of Alexandria*, 5 Cranch, 49, 53. *Brown* v. *Mott*, 7 Johns. 361.

The agreement made by the plaintiffs with one of the makers, upon receiving payment of part of the note, did not discharge the indorser; because it was not a technical release, but a mere covenant not to sue; and because it expressly reserved all rights against the indorser and the joint promisor. *Perkins* v. *Gilman*, 8 Pick. 229. *Sohier* v. *Loring*, 6 Cush. 537.

It follows that the defendant, though a married woman, yet, having capacity under the St. of 1874 to make the contract with the plaintiffs upon which this action is brought, is liable to them for that part of the note which has not been paid.

Judgment for the plaintiffs accordingly.

SARAH G. NEWTON *vs.* LOVELL BAKER & another.

Worcester. Jan. 2. — July 17, 1878. AMES & LORD, JJ., absent.

A bill in equity to redeem a mortgage alleged that the mortgage and the note secured by it were given without consideration for the accommodation of the mortgagee, by whose false and fraudulent representations they were obtained; and that an assignee of the note and mortgage took them after the maturity of the note in trust for the mortgagee, and under such circumstances as to be affected with all the equities between the original parties. At the hearing before a master, the mortgagor testified that the mortgage was given, not to represent any debt, but only to help the mortgagee to raise money by depositing it as collateral security, while the mortgagee testified that the mortgage was not given him to raise money, but represented the debt due him, which was then settled between them. There was also evidence that, at the time of the assignment, the mortgagor consented that the assignee, who took the note, which was payable on demand, unindorsed, by an assignment without recourse, six months after date, might hold the mortgage instead of the mortgagee. The master found that, although the note was made at the request of the mortgagee and for his accommodation, upon his representation that he could obtain money upon it by depositing it as collateral security, yet that the real purpose of the mortgagee in taking it was to obtain security for the debt already due him; that the mortgagor did not know the amount then due from him, and no settlement was made between them, and the note was not given for any ascertained debt; that the actual debt was much less than the mortgage note at its date; and reported the amount due with all the evidence. A decree was entered in accordance with the master's report. *Held*, on appeal therefrom, that the decree must be affirmed.

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COLT, J. This is a bill, filed September 13, 1875, to redeem a mortgage given by Ebenezer Newton to Lovell Baker to secure a note payable on demand to the order of Baker, with interest at the rate of ten per cent., both dated in April, 1874, and both assigned to Milton Baker in October following. The plaintiff derives her title to the equity of redemption from Ebenezer Newton. It is alleged that the note and mortgage were given without consideration for the accommodation of Lovell; that they were obtained by the false and fraudulent representations of Lovell; that, if anything was ever due thereon, it has been paid; and that Milton took them, after the maturity of the note, in trust for Lovell, and under such circumstances as to be affected with all the equities between the original parties. The prayer is that the mortgage be discharged, and that the plaintiff may be permitted to redeem if anything is found due thereon.

The case was sent to a master to state the accounts between the parties growing out of the consideration and alleged payment of the mortgage, reserving to the plaintiff the right to apply to the court to have issues framed to the jury to try any other questions of fact arising. The master, in his report, finds that the actual debt of Ebenezer Newton, secured by the mortgage, was on April 1, 1875, much less than the face of the mortgage note, and that the amount so ascertained is due with interest at the rate of ten per cent. per annum from that date. This result was obtained by the master upon a full investigation of the pecuniary relations of the parties to the mortgage, both before and after it was given.

Many exceptions were taken by the defendants to the findings of the master in matters of fact. At the request of the defendants, all the evidence taken by the master was reported, and both parties have treated this evidence as properly before the court, although the master was required, by the terms of his appointment, only to state the account between them. At the hearing before the single judge for final decree, the findings of the master appear to have been approved, and a decree for the plaintiff was ordered in accordance with his report. From this decree the defendants appeal; and the case has been treated as if all the evidence and the exceptions to the master's findings were before us upon a report of the judge.

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The defendants now contend that the evidence shows that the mortgage note was given by Newton to Lovell Baker, as an accommodation note, to be used by the latter in obtaining money for his own use, and not in payment of or as collateral security for the debt actually due him, and that the assignment of this note and mortgage to Milton Baker, although some six months after it was dated, was the original negotiation of the note, and furnished the consideration which alone is sufficient to support the claim of Milton to hold it for the full amount. If this be so, the amount of the debt to Lovell at the date of the note, and the question whether that debt is wholly or partly paid, would be wholly immaterial.

But the report of the master conflicts with the defendants' position. He finds that, although the note was made at the request of Lovell and for his accommodation, upon his representation that he could obtain money by depositing it as collateral security, yet that the real purpose of the latter in taking it was to obtain security for the debt already due him; that Newton did not know the amount then due from him, and no settlement was made between them, and the note was not given for any ascertained debt. Upon this finding, the master proceeds to ascertain the debt actually due on April 1, 1875, and reports the sum then due with interest at the rate of ten per cent. per annum as the amount secured by the mortgage. The report necessarily implies a finding by the master that, as between Newton and Lovell Baker, the latter had a right to hold the mortgage only as security for the actual debt due him; and that Milton Baker, who took the note payable on demand, without indorsement, by an assignment of the same without recourse, six months after its date, succeeded only to the title of Lovell Baker. It is plain that the master did not find that this was an accommodation note in the sense in which that phrase is used in the law of bills and notes. It is true the evidence on these points is somewhat conflicting; according to Newton's testimony, the mortgage was given, not to represent any debt, but only to help Lovell to raise money by depositing it as collateral security; while Lovell himself testifies that the mortgage was not given to help him to raise money, but represented the debt due him, which was then settled between them. The finding of the master, that it was given as

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security for the actual debt, does not appear to be clearly erroneous, and cannot be overruled on the evidence reported. The question depends largely on the appearance of the witnesses before the master. *Dean* v. *Emerson*, 102 Mass. 480. *Gerrish* v. *Black*, 104 Mass. 400.

The position now taken by the defendants is moreover inconsistent with the position taken by them at the hearing before the master, which was, that the note was given to secure an actual debt found due and agreed on between the parties.

Upon this state of facts, there was nothing in the interview between Newton and Lovell and Milton Baker, at the time the note and mortgage were assigned to the latter, which could operate by way of estoppel or otherwise, to deprive the plaintiff of the right to redeem the mortgaged estate, upon payment of the amount actually due as found by the master. The declarations of Newton amounted, at most, only to an assent on his part that Milton might hold the mortgage instead of Lovell. There was no representation that the full amount was due, or that any amount was due; and there is no suggestion that any fraud was designed by Newton upon any one.

Upon the whole, we see no error in law or fact in the decree of the single judge. When a case is heard by this court on appeal, upon a report of the evidence, his decree will not be reversed on a question of fact, unless it clearly appears to be erroneous. *Reed* v. *Reed*, 114 Mass. 372. *Montgomery* v. *Pickering*, 116 Mass. 227. *Decree affirmed.*

G. F. Hoar & G. F. Verry, for the defendants.

F. P. Goulding, for the plaintiff.

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JOHN R. WILLIAMS & another *vs.* CITY OF TAUNTON.
EDWIN WILLIAMS *vs.* SAME.
ALEXANDER H. WILLIAMS *vs.* SAME.

Bristol. Jan. 28. — July 29, 1878. ENDICOTT & SOULE, JJ., absent.

On a petition for damages for land taken by a city in constructing waterworks, the petitioner was asked, on cross-examination, against his objection, "What became of the loam on the land?" He answered that he took some with the consent of the water commissioners. *Held*, that the question and answer were immaterial, and that the petitioner had no ground of exception.

At the trial together of several petitions for damages, for the taking of separate parcels of land by a city in constructing waterworks, declarations of one of the petitioners, made before the taking, tending to show that the lands in the neighborhood would be benefited by the waterworks, were admitted against the petitioners' objection. *Held*, that, although the petitioner making the declarations was at the time a member of the city government, the evidence was admissible against him; and that, as it did not appear that the other petitioners asked to have the declarations restricted to the case of the petitioner making them, no ground of exception appeared.

An expert, who has testified that the point of drainage of surrounding lands by a filter basin, on land taken for that purpose, may be determined, may be asked if the level has been determined by experiment, at which water stands under soil generally, and may state the results of experiments made by him in his laboratory in proving that fact.

On the question of damages for land taken by a city for a public use, evidence of the distance from the land to certain public places in the city is admissible for the purpose of showing its relation to the thickly settled portions of the city.

At the trial of a petition for a jury to assess the damages for the taking of land by the city of Taunton under the St. of 1875, *c.* 217, providing in § 2 that "any person injured in his property" may have his damages assessed "in the same manner as is provided where land is taken for highways," the presiding judge instructed the jury that the petitioner would not be entitled to the whole market value of his land, if they found that, "on the whole, the advantages exceed the injury, if any there is to the remaining lands," which were parcel of the land taken. *Held*, that the petitioner had no ground of exception.

THREE PETITIONS, under the St. of 1875, *c.* 217, to the Superior Court, for a jury to assess the damages occasioned by the taking of the petitioners' lands, situated in Taunton, by the respondent, in supplying the city with pure water.

The cases were tried together, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

It was admitted that the several petitioners were the owners of the lands, as set out in their several petitions; that the peti-

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tioners had applied to the county commissioners for the county of Bristol for the assessment of their several damages; and that, after such assessments had been duly made by the commissioners, these petitions were filed.

The record of the taking of the lands by the city set forth that the lands were taken "for the purpose contemplated in said act, viz.: for the purposes of constructing filter beds, basins, reservoirs and wells therein, erecting thereon boiler and engine-houses, and other buildings and structures necessary or convenient for the waterworks, laying conduits and pipes, constructing necessary roads and approaches, and generally for doing in and upon said lands all things necessary or proper to be done for the purpose of establishing and maintaining its system of waterworks."

Alexander H. Williams and Edwin Williams, two of the petitioners, were each asked, on cross-examination by the respondent, against the objection and exception of the petitioners, "What became of the loam on that portion of your land taken by the city?" They each replied that the city had most of it, and that they took some with the assent of the water commissioners.

Several witnesses testified to conversations with Alexander H. Williams, which were admitted against the petitioners' objection, to the effect that, when experiments were being made to determine the location of the waterworks, Williams said they had better be on the Taunton side of the river; that he would be liberal with the city; that he was desirous of having the works on his and his brothers' land; that the price could be easily fixed; and that the expense of land would not be half as great as on the other side of the river. One witness testified that Williams said "they would let the city have it at their own price," and that it would be a great benefit to Ward 5 and to property holders. It appeared that the lands taken were in Ward 5, and that, at the times of the above conversations, Williams was a member of the common council of the city from this ward.

The petitioners contended that their lands were injured from drainage by the filter basin of the respondent's waterworks. On this point, William R. Nichols, a chemist, was called as a witness

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by the respondent. It was admitted that he was an expert. He testified, among other things, that the point of drainage of the remaining lands, by the filter basin on the land taken, could be determined by experiments on the lands; and the witness testified at length as to the manner of doing this, by driving tubular wells at various distances from the filter basin, and noting the effect upon those wells as the water was drawn down in the filter basin. The witness was then asked, "Has the level at which water stands under the soil been determined by experiment?" This question was objected to, except as to those experiments made on the lands of the petitioners; but the judge permitted the witness to testify, subject to the petitioners' exception, at length, as to the experiments made by him, in connection with diagrams used by him in classes connected with the Institute of Technology at Boston, which were exhibited to the jury. It appeared that these experiments were made, in the laboratory of the witness in Boston, in small boxes; that he had put sand and gravel into these boxes, in its natural state, so far as he could, and allowed the earth to settle. The amount of earth used was about six feet in length, about six inches deep and four inches in width, and the Cochituate water was allowed to flow into this earth from a tube.

A view was taken of the premises before the trial, and in the opening remarks made to the jury, before the view, by the respondent's counsel, it was contended that the benefits arising to the several petitioners, by the laying out and opening of public streets over the land taken, since the land was taken, and the prospective benefits from a bridge to be constructed over Taunton River, by which the distances to the station of the Old Colony Railroad, Taunton Green and other important points were diminished, were to be considered. The petitioners contended that all such benefits, if any there were, could not be considered by the jury. This opening statement was objected to, but no exception was taken to it.

Alfred H. Martine, a civil engineer, called by the respondent, was allowed, against the petitioners' objection, for the purpose of showing the relation of the petitioners' land to the thickly settled parts of Taunton, and public places of resort therein, to state the distance to the Old Colony Depot, from the corner of

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the land taken at Williams Street, by the highway, across a certain bridge, and also other distances along the route, to Taunton Green, the Unitarian Church, &c. It appeared that the route of which he gave measurements was the only route by the highway to the Old Colony Depot. The witness was also asked, "What is the distance from the same point to the Old Colony Depot in an air line?" To this the plaintiffs objected, but the judge admitted the evidence for the purposes to which the other measurements applied. The witness gave an estimate of this distance.

The judge rejected evidence offered by the respondent to show that, by a street laid out over the land taken, and since the taking, and by a contemplated bridge over Taunton River, under the St. of 1877, *c.* 72, the lands of the petitioners would be brought a mile nearer the station of the Old Colony Railroad than they were at the time of the taking.

The petitioners asked the judge to give certain instructions to the jury, which it is unnecessary now to state. The judge declined to give the instructions requested, in the form in which they were presented; but instructed the jury as follows:

"The petitioners are entitled to recover compensation for all damages to their several tracts of land, occasioned by taking parts of these tracts for the uses and in the manner in which they were taken by the location. Such damages will include the value of the land taken from each tract, the diminished value of the residues of the tracts occasioned by the taking, by reason of any injury to those residues inseparable from any of the uses to which the city of Taunton may lawfully put the land taken. The value of the land taken may be determined, not necessarily by its value for the uses to which it was put before or at the time of taking, but by its value for any uses to which it was, at the time of taking, adapted and available. The diminished value of the residue of the tracts, occasioned by the taking, may be determined by considering the effect of the taking in dividing the petitioners' lands, so that access from one part to another, which before the taking had been direct and convenient, became by the taking indirect and inconvenient, in depriving petitioners of access to the river for any valuable use to which the river could be applied in connection with their several tracts

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of lands; in exhausting or withdrawing from the soil of such residues of land natural supplies of water, needful to the same, in any of the uses to which they were adapted and available; and also the effect of the taking, in view of its character, purposes and influence, in any benefits or advantages the residue of land derived from the taking, by which such residue became adapted and available to new and valuable uses, or received an enhanced value for the uses to which they were applied before the taking; but all such advantages and benefits are to be those which the several petitioners in some specific or peculiar form receive from the taking, and not those benefits or advantages which the petitioners receive in common with other persons owning land in the vicinity, the practical question being this: What sums of money will compensate the several petitioners for all the consequences of the taking parts of their several tracts of land, for the use and in the manner in which they were taken, in view of the loss of what has been taken and the effects more or less injurious, and more or less beneficial, of the taking upon what remains to the petitioners of their several tracts?

"The city of Taunton took the land of petitioners on July 7, 1876, and to that the inquiry as to damages applies; and, inasmuch as the act of taking reserved to the petitioners no right to use any part of the land taken for any purpose, the effect of the taking, with reference to damages, is to be considered as if, by the taking, the petitioners were absolutely excluded from any use of the land taken, for passing from their land not taken to and from the river, or to and from one part and another of the land not taken. In considering the area of the land of the several petitioners taken by the city of Taunton, the jury will treat the boundary of the land taken on the river as the lowest line to which the tide ebbs from natural causes. The petitioners are entitled to receive interest on their damages from July 7, 1876.

"Any evidence of declarations of Alexander H. Williams as to his desire that the land taken for the purposes of waterworks should be from his farm, or in Taunton, or in Ward 5, ought to be considered with such reasonable explanations as are afforded by his official relation to the city of Taunton, in determining whether he at the time of making such declarations, in view of

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what he knew of the probable and expected scope of the taking and the future use of the land taken, considered the location on his land more or less beneficial to the residue of his land, and whether his present claim is inconsistent with his claim and testimony in this trial."

The judge further instructed the jury "that the petitioners would not be entitled to the whole market value of their lands, if the jury find that on the whole the advantages exceed the injury, if any there is, to the remaining lands."

The jury returned a verdict for each petitioner for less than the respective claim of each; and the petitioners alleged exceptions.

G. Marston & C. A. Reed, for the petitioners.

T. M. Stetson & S. M. Thomas, for the respondent.

LORD, J. 1. Two of the petitioners were asked, in cross-examination, what became of the loam taken from their respective lands. The question was clearly immaterial, and therefore not subject to exception. The answer to it was, in law, immaterial; if, in fact, it was liable to be understood by the jury as derogating from the damages sustained by the petitioners, they should have objected to the answer, or, at least, have requested a ruling upon its effect; but they did neither; and the presiding judge, in his general ruling upon the petitioners' claim, excluded the idea that the value of the loam thus received by the petitioner was to be deducted from or taken into consideration by the jury upon the amount of his damages.

2. One of the witnesses, who was also a party, was, when the work was done, a member of the common council for Ward 5 of the city of Taunton, and his land was within the limits of Ward 5. Evidence was offered of his declarations in reference to the locality of the works, and this was objected to. At the argument, it was contended that the evidence, if admissible at all, should have been restricted to his case, and should not have been allowed to have any influence over the cases of the other petitioners; and that the evidence was not admissible at all, on the ground that he was then a public officer and that his declarations were to be presumed to be made in the public interest and not with reference to his private interest. The first objection is not open on this bill of exceptions. If his declarations were

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admissible against him, and the other petitioners did not wish to be prejudiced by them, they should have asked for instructions restricting them to the case of the witness. The bill of exceptions does not show that this was done, or that proper instructions were not given. As to the other objection, if the public interest and the private interest of the witness were identical, there would seem to be no objection to the evidence. If, however, the several interests were in conflict, and he took part in the consideration of the subject, we see no reason why what he said and what he did, having a bearing upon the issue, should not be submitted to a jury. The standard of official virtue is not so high, that the court can say, as matter of law, that, when a public officer takes part in a matter in which he has also a private interest, such action is necessarily for the exclusive advantage of the public welfare and in derogation of his private advantage. We think the party can take no just exception to the language of the presiding judge upon that subject.

3. A witness, agreed to be competent as an expert upon the subject, testified that, by experiments upon the land, the drainage of the remaining lands by the filter basin on the land taken could be determined. He was then asked, "Has the level at which water stands under the soil been determined by experiment?" This question was objected to, unless the experiments were made upon the lands of the petitioners. The objection was rightly overruled. The right of a person, called as a witness, to give an opinion as an expert, or to testify to any conclusion to which his skill leads him, to state his reasons and the mode by which he arrives at his conclusions, has been many times considered by this court. It was thus held in a capital trial, against the objection of the prisoner's counsel; *Commonwealth* v. *Webster*, 5 Cush. 295, 301; and has since been repeatedly so decided in civil cases, and exhaustive reasons therefor given by Shaw, C. J., in *Dickenson* v. *Fitchburg*, 13 Gray, 546, 555, 556. The testimony of the expert is commented on as if the witness had testified to the height at which water actually stood in land at Taunton, and that height determined by means of experiments in small boxes in Boston. No such evidence was admitted or offered. The witness was asked a question of science or skill: "Has the level at which water stands under the soil been deter-

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mined by experiment?" Not at Taunton, nor at Boston, nor at any other place, but generally; and, having answered the question affirmatively, he then proceeds to state how, in the classes connected with the Institute of Technology in Boston, he was accustomed to demonstrate, explain and illustrate the mode of proving the fact by means of diagrams, boxes, sand, gravel, &c., in his laboratory.

4. The only remaining objection to the admission of evidence was that which related to the distance from the petitioners' land to certain public places, such as the Old Colony Depot, Taunton Green and Unitarian Church. The testimony offered was that of a civil engineer who had measured the several distances. The presiding judge admitted the evidence "for the purpose of showing the relation of the petitioners' land to the thickly settled parts of Taunton and public places of resort therein." These may be, so obviously, elements of value of the land taken, that this court cannot say that the evidence is incompetent.

5. A long series of prayers for instructions was presented by the petitioners' counsel to the presiding judge. These instructions were given substantially, except in so far as they were in conflict with this ruling, to which exception was taken, "that the petitioners would not be entitled to the whole market value of their lands, if the jury find that on the whole the advantages exceed the injury, if any there is, to the remaining lands." We understand this instruction to have been given not for the purpose of fixing a rule by which the jury were to assess the damages, but for the purpose of meeting a special proposition of the petitioners, substantially this: that the respondents were to pay for the full value of the land actually taken at all events, wholly irrespective and independent of the question of benefit or injury to the land not taken; and that, even if the land not taken was made better and more valuable by the taking, such benefits could not be taken into account by the jury, but the whole value of the land must be assessed; while, if the injury to the remaining lands was greater than the benefits, the excess of such injury over the benefits was to be assessed in addition to the value of the land taken. If the remaining lands, claimed to have been injured or benefited, were different lands from that which was

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taken, there might be difficulty in thus laying down the rule; but the remaining lands were parcel of the land taken, and, in this view, we think the instruction was correct.

It is to be observed that the only standing which the petitioners have in court is derived from the provisions of the act itself. The second section of the act has this provision: "Any person injured in his property under this act, and failing to agree with said city as to the amount of damages, may have the same assessed and determined in the same manner as is provided where land is taken for highways." It will be seen, from this provision, that it is unnecessary to determine whether the estate taken is called an easement, a base fee determinable upon a future contingency, or a fee simple. For all practical purposes, the condemnation of the property is a perpetual one, and was so treated by the presiding judge, and the jury so considered it under his instructions. What may be the technical name by which such right shall be called is immaterial. The statute does not provide that the petitioners shall recover the value or the price of the land taken, nor does it make any reference to the comparative amount of benefit or injury. It uses only the broadest and most equitable language. "Any person injured in his property" may have his damages "assessed and determined in the same manner as is provided where land is taken for highways." When, therefore, a person is the owner of a tract of land, and a portion of that land is taken and the remaining portion is claimed to be injured, the entire tract, of which the land taken and the land remaining are severally parcels, is the property injured, and it is the extent of that injury which is to be determined. It is therefore a question simply of indemnity. What sum of money is an indemnity against the injury? Taking nothing but the language in which his right to damages is given, the actual injury to his property must be determined by ascertaining what sum of money will make his property as valuable as it was before it was interfered with.

But we do not deem it necessary to place the decision wholly upon that ground. We think that the language of the act, "in the same manner as is provided where land is taken for highways," is not confined simply to the petition for a jury, or to an assessment of damages by a jury; but that "in the same man-

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ner" means under the same rules and principles of law so far as applicable to the subject matter. Various criticisms have been made upon the language of the rulings, which we deem wholly unfounded. It is said in argument that the language of the presiding judge, "if the advantages exceed the injury," is in conflict with the rule as declared in *Upton* v. *South Reading Branch Railroad*, 8 Cush. 600. This is not so. The presiding judge in this case gave the legal meaning to the word "advantages," and gave it correctly. In *Upton* v. *South Reading Branch Railroad*, the word "advantages" was not limited to its legal meaning, but embraced the general rise of property common to all estates in the vicinity.

It is not necessary to notice particularly other similar exceptions. It is sufficient to say that the cause was submitted to the jury under instructions adapted to the case and which are unobjectionable in law, and that the various rulings upon questions of evidence were sufficiently favorable to the petitioners.

Exceptions overruled.

JAMES DUGAN *vs.* DANIEL A. NICHOLS.

Essex. November 10, 1876; April 2. — July 24, 1878.

Evidence that a purchaser paid the price and took a bill of sale of certain goods pointed out to him by the seller, which were separate and apart from the other goods of the seller, will warrant a jury in finding that the purchaser acquired title to the goods as against the seller, in whose possession they remained.

An assignee in bankruptcy has no better title than the bankrupt, except in goods conveyed in fraud of creditors.

REPLEVIN of thirteen barrels of oil. Writ dated July 10, 1874. At the trial in the Superior Court, at December term 1875, before *Lord*, J., the plaintiff offered evidence tending to prove that he purchased the oil of the firm of Shaw & Bruce, of which the defendant is the assignee in bankruptcy, under the following circumstances:

On January 3, 1874, Shaw called upon the plaintiff, and asked him to purchase some oil and some splits, saying that the firm had found it necessary to go into bankruptcy, and had consulted

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counsel on the subject; that it was necessary to raise money to pay the expenses incident to the commencement of proceedings, and that they had been advised that they could properly sell some of their property for that purpose. The plaintiff at first declined, but, being assured that counsel had said it was all right, provided they sold for fair prices, said he would see the counsel on the subject, and asked Shaw where the goods were. Shaw replied that he had brought the splits with him and that they were then in the plaintiff's basement, but that the oil was at the firm's shop. Shaw and the plaintiff thereupon proceeded to the counsel's office, and on the way, in passing the shop, Shaw, pointing to the barrels of oil, said, "That is the oil." The oil was in a shed separate from any other property, where it remained, with no agreement to pay storage by the plaintiff, until it was replevied. Counsel informed the plaintiff that he might safely purchase and pay for the goods under the circumstances, and thereupon a bill of sale of the thirteen barrels of oil and of the splits was written and given by Shaw to the plaintiff, who thereupon paid him a fair market price for the same. Upon cross-examination, the plaintiff testified that he had not agreed to purchase, nor had the bargain been consummated, until after he had talked with the counsel.

Shaw & Bruce filed their petition in bankruptcy on January 6, 1874, and the defendant was duly chosen assignee on February 16, 1874. The plaintiff also offered evidence tending to prove a demand upon the defendant before the date of the writ.

The judge ruled that the evidence was not sufficient to prove a delivery of the oil to enable the plaintiff to maintain the action; ordered a verdict for the defendant, and reported the case for the consideration of this court. If, upon the facts and evidence, the plaintiff was entitled to go to the jury upon the question of delivery, the verdict was to be set aside and a new trial ordered; otherwise, judgment for the defendant.

The case was argued in November, 1876, by *S. B. Ives, Jr.*, for the plaintiff, and *C. Sewall*, for the defendant; and in April, 1878, in writing, by *S. B. Ives, Jr. & G. A. Goddard*, for the plaintiff, and *C. Sewall*, for the defendant.

MORTON, J. There was evidence in this case which would have justified the jury in finding, that, as between the parties to

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the contract of sale, the property in the oil replevied passed to the plaintiff. By the delivery of the bill of sale and the payment of the price, the title passed, so that the oil was at the risk of the purchaser, and, if it had been destroyed, the loss would have fallen upon him. *Weld* v. *Came*, 98 Mass. 152. *Morse* v. *Sherman*, 106 Mass. 430. *Townsend* v. *Hargraves*, 118 Mass. 325. The title having passed to him, the purchaser could at any time have taken possession of the oil as against the sellers, and could maintain replevin against them.

The further question in the case is, whether he is entitled to possession as against the assignee of the sellers. It is not necessary to decide whether the plaintiff has a title which is good against subsequent innocent purchasers or attaching creditors of the sellers. An assignee in bankruptcy does not stand in the position of such purchaser or creditor. He takes the same interest in and title to the property which the bankrupt has. The law provides that the judge or register shall "assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to all such property and estate, both real and personal, in the assignee," with certain exceptions not material in this case. U. S. Rev. Sts. § 5044. It should be observed that the bankrupt law nowhere has the provision contained in the insolvent law of Massachusetts, that the assignment shall vest in the assignee all the property of the insolvent debtor, which he could have lawfully sold, or "which might have been taken on execution upon a judgment against him." Gen. Sts. *c.* 118, § 44.

In the recent case of *Donaldson* v. *Farwell*, 93 U. S. 631, it appeared that the bankrupt, before the commencement of proceedings, purchased goods of the defendant with the intention not to pay for them. After the commencement of proceedings, the defendant discovered the fraud and took possession of the goods, and the suit was brought by the assignee to recover their value. It was held that, as against the purchaser, the vendor had the right, if no innocent third person had acquired an interest in the goods, to disaffirm the sale and recover the goods; that the bankrupt had a defeasible title, and that only his defeasible

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title passed to his assignee. The court put the decision upon the ground that, if the property has not been conveyed in fraud of creditors, the assignee has no greater interest in or better title to it than the bankrupt.

This is decisive of the case at bar. As we have said before, the evidence would justify the jury in finding that the title to the oil passed to the plaintiff, as between the parties. This being so, the bankrupts had no title at the commencement of the proceedings in bankruptcy, and no title vested in the defendant, their assignee. As against them, the plaintiff might take possession of the goods, if he could do so peaceably, or recover possession of them by a writ of replevin. *In re McKay*, 1 Lowell, 345. *In re Griffiths*, 1 Lowell, 431. *Goss* v. *Coffin*, 66 Maine, 432. *New trial ordered.**

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* A similar decision was made in Worcester, on the same day, in the case of JAMES D. GREEN *vs.* ALBERT D. HOLMES.

REPLEVIN of a horse, express wagon, safe, three show cases and a cigar case.

At the trial in the Superior Court, before *Pitman*, J., without a jury, it appeared that the plaintiff's brother, George D. Green, who was in the retail grocery business at Lancaster, owed the plaintiff in February, 1876, $400 for services as clerk in the store, and on February 11 sold the plaintiff the goods in question, and the plaintiff received them in payment of his claim and took a bill of sale; and that George D. Green went into bankruptcy in about two months after the sale, and the defendant was chosen assignee of his estate and took possession of the goods in question.

The evidence upon the question of delivery to the plaintiff was as follows: The plaintiff testified that after the bill of the articles was made out, his brother went to the back of the store in which they both were, and within about ten feet of the horse and wagon, which were standing outside in the usual place of waiting for goods, and, pointing to them, said, "These I hand over to you;" that he then stepped inside the store and pointed to the show cases and cigar case, and to the safe, and said that he handed them over to him, and then passed him the bill of sale. It also appeared that the cigar case was about two feet square and was upon the counter, with cigars in it; that the show cases were each six or seven feet long and two feet wide and from six to eight inches deep, and were also upon the counter, filled with goods, and that the safe weighed 1500 pounds.

George D. Green continued to carry on the business at the store, as formerly, until his failure; and the plaintiff testified that, at the time of the sale, he gave him permission to use the articles till June 1, 1876, and that they were so used to the time of his failure in business.

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ASA P. MORSE *vs.* GOODRICH M. DAYTON.

Suffolk. Nov. 22, 1877. — July 18, 1878. COLT & LORD, JJ., absent.

Questions of law, arising at the trial, in the Superior Court, of charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, may be reported to this court, after verdict, under the Gen. Sts. *c.* 115, § 6.

An appeal from the judgment of a magistrate upon charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, by which the debtor is adjudged guilty of some of the specifications in the charges and not guilty of others, vacates the whole judgment, and opens the case for trial upon all the charges, although the other party does not appeal.

A creditor, who has filed charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, from the judgment of the magistrate on which charges the debtor has appealed, is not barred from prosecuting the charges by proving his claim against the debtor in bankruptcy, pending the hearing before the magistrate and before the charges are filed.

APPEAL by Goodrich M. Dayton from a judgment and sentence rendered by a magistrate upon charges of fraud filed by a judgment creditor against him upon his application to take the oath for the relief of poor debtors.

Trial in the Superior Court, before *Putnam*, J., who, after verdict, reported the case for the determination of this court in substance as follows:

On March 28, 1876, the debtor was arrested upon an execution in favor of the judgment creditor, and gave the recognizance required by the Gen. Sts. *c.* 124, § 10. On April 24, 1876, the debtor appeared before a magistrate duly authorized to act, and applied to take the oath for the relief of poor debtors. The creditor appeared, by his attorney, before the magistrate and examined the debtor, and the examination was continued by adjournment until May 13, 1876, when the creditor filed charges

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Upon this evidence, the judge ruled that it appeared, as matter of law, that no sufficient delivery was made; and ordered judgment for the defendant. The plaintiff alleged exceptions.

G. F. Verry & F. A. Gaskill, for the plaintiff.

H. E. Fales, for the defendant.

BY THE COURT. This case is governed by *Dugan* v. *Nichols*, *supra*. There was sufficient evidence of delivery to be submitted to the jury.

Exceptions sustained.

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of fraud against the debtor as provided in the Gen. Sts. *c.* 124, §§ 31–34. To these charges the debtor pleaded not guilty; and thereupon a hearing and trial were had before the magistrate, who found that the debtor was guilty of specification numbered 5 in said charges and not guilty of all of the other specifications, and, on that ground only, refused the debtor the oath for the relief of poor debtors, and sentenced him to ten days' imprisonment in the county jail. From this finding and sentence, the debtor appealed. The creditor did not appeal.

Afterwards and pending the appeal, namely, on April 18, 1877, the debtor filed a further plea to the effect that on April 19, 1876, he was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts; and that on May 2, following, the creditor proved the judgment, upon which the execution issued whereon he was arrested, against his estate in bankruptcy.

At the trial, the creditor proposed to offer evidence upon all of the specifications in the charges. To this the debtor objected, on the ground that, the debtor having been acquitted by the magistrate upon all but the fifth specification, and the creditor not having appealed from that decision, the fifth specification only was open to the creditor on this appeal. The judge sustained the objection, and ruled that evidence could be introduced under the fifth specification only.

The truth of the debtor's last plea having been admitted by the creditor, and it appearing that the creditor had proved his judgment against the estate of the debtor in bankruptcy, while the hearing before the magistrate was pending, and before the charges of fraud were filed, the judge ruled that this proceeding could not further be maintained by the creditor; directed the jury to return a verdict for the debtor; and reported the case for the consideration of this court.

If the rulings were correct, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered.

D. B. Gove, for the creditor.

R. D. Smith & M. M. Weston, for the debtor.

GRAY, C. J. The proceedings upon the application of a debtor to be admitted to take the poor debtor's oath, and upon charges of fraud filed by the creditor by way of answer to such

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an application, are in their origin and trial, and as regards the jurisdiction of courts, in the nature of a civil action. *Parker* v. *Page*, 4 Gray, 533. *Stockwell* v. *Silloway*, 100 Mass. 287. *Anderson* v. *Edwards*, 123 Mass. 273. Questions of law arising at the trial in the Superior Court might therefore be reported after verdict for the determination of this court. Gen. Sts. *c.* 115, § 6.

From the judgment of a magistrate on such charges of fraud, "either party may appeal to the Superior Court, in like manner as from the judgment of a justice of the peace in civil actions." Gen. Sts. *c.* 124, § 32. In the case of an appeal from the judgment of a justice of the peace in a civil action, "the case shall be entered, tried and determined, in the court appealed to, in like manner as if it had been originally commenced there." *c.* 120, § 25. The appeal vacated the whole judgment of the magistrate, as well that part which was in favor of the appellant, as that part which was against him, and opened the case for trial in the Superior Court upon all the charges of fraud.

The provision of the bankrupt act of the United States, that a creditor proving his debt in bankruptcy shall not be allowed to maintain any suit against the bankrupt, but shall be deemed to have waived all right of action against him, and to have discharged and surrendered all proceedings already commenced, and unsatisfied judgments already obtained, does not prevent the creditor from bringing a new suit and making a new arrest on the same debt, in case a certificate of discharge in bankruptcy is refused. U. S. Rev. Sts. § 5105. U. S. St. June 22, 1874, § 7. *Valpey* v. *Rea*, 124 Mass. 99.

But a debtor discharged from arrest or execution, under the statutes of the Commonwealth, on his application to take the poor debtor's oath, will be exempt from arrest upon any subsequent execution or process on the same judgment or for the same cause of action. Gen. Sts. *c.* 124, § 22. The proceedings on such an application, and on the incidental charges of fraud against the debtor, are not affected by the commencement of bankruptcy proceedings, or even by a certificate of discharge obtained thereon, and cannot therefore be defeated by the mere proof in bankruptcy of the creditor's claim. *Stockwell* v. *Silloway*, 100 Mass. 287, and 105 Mass. 517.

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It follows that the rulings of the learned judge of the Superior Court were erroneous upon both the questions reserved by him for our decision. *New trial ordered.*

SIMON AHREND *vs.* GEORGE F. ODIORNE & others.

Suffolk. March 8. — July 18, 1878. COLT & SOULE, JJ., absent.

In an action against the principals and a surety on a bond, executed in the name of a firm by one of two partners named as principals, and by the surety, the default of the principals is an admission of the due execution of the bond by the firm, which the surety cannot controvert.

If a person signs a bond as a party thereto, it is immaterial that he is not named in the bond.

CONTRACT against George F. Odiorne, Retire C. Sturges, George Odiorne, K. W. Baker, William Maxson and Alexander Irving, upon a bond in the sum of $40,000, executed to the plaintiff, in which Sturges and George F. Odiorne, doing business under the name of R. C. Sturges & Co., were named as principals, and Maxson and Irving as sureties, and conditioned that the principals should build a certain vessel and perform a certain contract. The bond was signed by "R. C. Sturges & Co.," Maxson & Irving, George Odiorne and K. W. Baker. George Odiorne alone defended. The other defendants were defaulted.

At the trial in this court, before *Lord*, J., George Odiorne offered evidence tending to prove that he did not sign the bond intending to be bound as a party thereto, and that no seal was on the bond against his signature at or about the time when he signed his name. The plaintiff then offered evidence tending to show that a seal was affixed at the time the signature was made.

The defendant George Odiorne asked the judge to rule that the bond was not his bond, and that it was inoperative and void as against him for the following reasons: 1. The execution of it by the principals was by Sturges, and there was no evidence tending to show that there was previous authority or subsequent ratification by the other partner. 2. The name of George Odiorne was not contained in the bond, and there was no evidence

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tending to show that it was omitted by accident or mistake. The judge declined so to rule.

The jury found specially that, at the time the defendant George Odiorne signed the instrument, there was a seal upon it against his signature; that he signed it, intending his signature to be attached to a sealed instrument, and intending by his signature to sign as a party to the instrument.

The judge thereupon directed the jury to return a verdict for the penalty of the bond; and the defendant alleged exceptions.

G. Odiorne, pro se.

R. M. Morse, Jr., for the plaintiff.

AMES, J. The objection that Sturges had no authority to sign the bond in the name of the firm, and thereby to bind his partner, cannot avail the defendant George Odiorne. Both of the partners are defendants in this suit, and their default is an admission that the instrument declared upon was duly executed by them. It must be taken, therefore, as a fact in the case, that the signature by Sturges was affixed to the bond, either with the previous authority or subsequent ratification of his copartner, a circumstance which distinguishes the case from *Russell* v. *Annable*, 109 Mass. 72.

The bond was signed and sealed by the defendant, and was delivered to the obligee in that condition. The jury have found that he signed it as a party to the instrument. Under such a state of facts, it is immaterial that he was not named in the bond itself as a party. *Smith* v. *Crooker*, 5 Mass. 538.

Exceptions overruled.

JOHN LIGHTBODY *vs.* SILVANUS SMITH & another.

Suffolk. March 8. — July 18, 1878. COLT & SOULE, JJ., absent.

In an action on an account annexed for work and labor, brought in the name of A. for the benefit of C., there was evidence that A., who was in the employ of B. by the day, assigned to C. all claims against B. for money due and to become due "for services rendered and to be rendered" for a certain time; that the consideration of this assignment was goods already furnished and to be furnished by C. to A.; that, before the time limited by the assignment expired, A. left the employ of B., and entered the employ of D., under an arrangement by which A. was to

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continue to work on B.'s premises at the same wages, to be paid by B. to D., and by the latter to A., partly in cash and partly in goods. *Held*, that A.'s employment by B. being by the day, he had the right at any time to find employment elsewhere; and that none of A.'s wages, after he ceased to work for B., passed by the assignment to C., although the arrangement between A., B. and D. was made with the intent to terminate the employment of A. by B., and deprive C. of the benefit of the assignment.

CONTRACT upon an account annexed for work and labor from April 18 to June 26, 1873, brought for the benefit of Joseph Davis, as assignee of the plaintiff.

At the trial in the Superior Court, before *Bacon*, J., without a jury, there was evidence that the plaintiff, on December 26, 1874, executed to Davis the following assignment:

"Know all men by these presents, that I, John Lightbody of Boston, in the county of Suffolk, in consideration of $150 to me paid by Joseph Davis of said Boston, the receipt whereof I do hereby acknowledge, do hereby assign and transfer to said Joseph Davis all claims and demands which I now have, and all which, at any time between the date hereof and the twenty-sixth day of June next, I may and shall have against S. Smith and J. L. Townsend, both of said Boston, copartners, for all sums of money due, and for all sums of money and demand which, at any time between the date hereof and the said twenty-sixth day of June next, may and shall become due to me, for services rendered and to be rendered; to have and to hold the same to the said Joseph Davis, his executors, administrators and assigns forever. And I, said John Lightbody, do hereby constitute and appoint the said Joseph Davis, and his assigns, to be my attorney irrevocable in the premises, to do and perform all acts, matters and things touching the premises, in the like manner to all intents and purposes, as I could if personally present."

There was also evidence that the plaintiff, at the time of making the assignment, and for a long time before and after, was at work for the defendants, at their yard, by employment from day to day, and by the day; that the plaintiff, at the time of making the assignment, was indebted to Davis for groceries to the amount of $165; that, subsequently to the assignment, the plaintiff received from Davis $43 worth of groceries; and Davis testified, against the objection of the defendants, that the consideration of the assignment was the amount due for groceries, and for

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such groceries as he might thereafter let him have; that the defendants paid to Davis, on the assignment, the sum of $125 for labor of the plaintiff up to April 18, 1874, being all that was due up to that date; that on April 20, 1874, the plaintiff went to Bedfield Erskine, and desired him to employ him; that Erskine and the plaintiff made an agreement between themselves, and, on the same morning, went to the defendant Smith, and notified him that the plaintiff would not work for the defendants any longer, but had hired himself to Erskine; that to this Smith assented, and subsequently, at the same interview, made an arrangement with Erskine that the plaintiff should work in the defendants' yard, and they would pay Erskine for the labor so furnished at the rate of $2 per day, which was the same amount they had been paying the plaintiff, and the same amount that Erskine agreed to pay him, Erskine paying him partly in groceries and partly in cash; and that all parties had notice of the assignment.

Upon this evidence, the judge found that the agreement between Erskine and the plaintiff was made with a view to fraudulently deprive Davis of the benefit of his assignment; that the defendants had knowledge of that intent when they made the arrangement with Erskine; that the plaintiff was, at the time of making the assignment, indebted to Davis in the sum of $165; that Davis subsequently let him have about $43 worth more of groceries; and that Davis drew on the assignment about $125.

The defendants asked the judge to rule, that, as the plaintiff was hired by the defendants from day to day, the agreement between Erskine and the plaintiff, and the subsequent agreement between Erskine and Smith, was a termination of any colorable contract, if any existed, which was the subject of the assignment, and that the plaintiff could not recover, notwithstanding that this might have been done with the intent to terminate the hiring and deprive Davis of the benefit of his assignment.

The judge declined so to rule; and ordered judgment for the plaintiff for the full amount of his claim, to wit, $110 and interest, being the full amount earned by him, as claimed in his declaration, between April 18 and June 26, and being the whole amount of his indebtedness to Davis. The defendants alleged exceptions.

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J. Bennett, for the defendants.

F. J. Munroe, for the plaintiff.

AMES, J. It may have been the expectation of all the parties concerned, at the time the advances were made to Lightbody, that he would continue in the employ of the defendants long enough for his wages to repay those advances. But there was no stipulation to that effect. On the contrary, his employment was by the day, and from day to day only. They had a right to discharge him at any moment; and he had a right to seek employment elsewhere whenever he saw fit. Except as to wages actually due him at the time of the assignment, it was an attempt to transfer a mere possibility of future earnings, and not an existing chose in action. *Mulhall* v. *Quinn*, 1 Gray, 105. *Twiss* v. *Cheever*, 2 Allen, 40. *Brackett* v. *Blake*, 7 Met. 335. *Low* v. *Pew*, 108 Mass. 347, 350.

The arrangement with Erskine, whatever may have been its motive, and however contrary to the assignee's expectations, was not a violation of Lightbody's contract. It was not fraudulent within the legal sense of the word, inasmuch as it was an act which he had a right to do, and which deprived the assignee of none of his legal rights. The defendants were therefore entitled to the ruling which they asked for upon this point; and none of the plaintiff's earnings after the 18th day of April passed by the assignment to Davis. *Exceptions sustained.*

JOSEPH KINSLEY *vs.* LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

Suffolk. March 11. — July 18, 1878. AMES & MORTON, JJ., absent.

A railroad corporation is responsible for an article of personal baggage, kept by a passenger exclusively within his own control, which is lost through the negligence of the corporation or its servants, and without fault of the passenger.

A passenger on a railroad, on leaving the car, in which he was travelling, at a station for the purpose of getting his dinner, inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave it there, that it would be perfectly safe. He left his baggage in the car, and, on his return, found that the car had been detached from the train, and his baggage re-

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moved to another car, where he could have a seat. On going to this car, he found only part of his baggage. No notice of the change had previously been given to him. *Held*, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the railroad corporation.

If a person, who has made a contract with a railroad corporation for his personal transportation from one place to another, takes a seat in a sleeping-car, and there loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defence to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts.

CONTRACT, with a count in tort, against a common carrier, for the loss of a hand-bag and its contents. Trial in the Superior Court, without a jury, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was a passenger on the defendant's railroad from Cleveland, Ohio, westward, having purchased in Boston coupon tickets, over that and other roads, from Boston to San Francisco. At Cleveland, the plaintiff also purchased a ticket which gave him a right to ride in the car China, one of two sleeping-cars which formed part of the regular train on the defendant's road. After leaving Cleveland, and before reaching Toledo, Ohio, notice was given to the passengers that twenty minutes would be allowed for dinner at Toledo. On leaving the car at Toledo for dinner, the plaintiff inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave all his baggage in the car, that it would be perfectly safe; and the plaintiff left the bag in question, with other articles, in the car. On his return from dinner, the plaintiff found that the car China had been taken from the train, and the doors of the car locked, and was informed that that car would not go beyond Toledo, on account of the small number of passengers, and that he could have a seat in the other sleeping-car, and would find his baggage there. On going into the other car the plaintiff found all his baggage except the bag in question. He applied to the conductor, and diligent search was made, but the bag could not be found.

The defendant offered to prove that the car China did not belong to it, but to George Gates and others, and was managed and controlled by the owners, and was in the immediate care

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and charge of their employees, under a contract with the defendant company, by which Gates and one Wagner were to furnish all the sleeping-cars deemed expedient to be run by the company, and were to place conductors and servants in the cars to take charge of them, and to collect the fares for the sleeping accommodations; and asked the judge to rule that, upon these facts, if proved, and the other facts in the case, the plaintiff could not recover. There was no evidence that this contract was known to the plaintiff, or that he had any notice that the car China was not owned by the defendant and in its exclusive control.

The judge ruled that the facts offered to be proved by the defendant would not constitute a defence to the action, and that the facts proved were sufficient to maintain the action; and ordered judgment for the plaintiff. The defendant alleged exceptions.

H. L. Hazelton, for the defendant.

C. R. Train & J. O. Teele, for the plaintiff.

GRAY, C. J. Although a railroad corporation is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within his own control, it is liable for the loss of such an article by the negligence of the corporation or its agents or servants, and without fault of the passenger. *Clark* v. *Burns*, 118 Mass. 275. *Bergheim* v. *Great Eastern Railway*, 3 C. P. D. 221.

In the present case, we need not consider whether the evidence introduced at the trial would justify the inference that the defendant had assumed the custody and control of the plaintiff's bag as a common carrier; for it was clearly sufficient to warrant the judge, by whom the case was tried without a jury, in finding that the bag was lost, without any fault of the plaintiff, by negligence on the part of the defendant in removing or undertaking to remove the plaintiff's baggage to another car in his absence and without notice to him.

The plaintiff's contract of transportation was with the defendant alone. The fact that the car was not owned by the defendant, but was used on its road under a contract with other parties, who furnished conductors and servants to take charge of such cars, there being no evidence that the plaintiff knew of

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that contract, or had any notice that the car was not owned by the defendant and under its exclusive control, could not affect the measure of the defendant's liability to the plaintiff.

Exceptions overruled.

ROBERT L. COOK *vs.* UNION RAILWAY COMPANY.

Suffolk. March 22. — July 18, 1878. AMES & MORTON, JJ., absent.

In an action for personal injuries occasioned to the plaintiff through the alleged negligence of the defendant, a horse-railroad corporation, the evidence tended to show that, at the time of the accident, the plaintiff was driving along a street, in the daytime, with the off wheels of his wagon in the outer rail of the defendant's track, at the rate of from four to six miles an hour; that the plaintiff was driving with a taut rein, his feet resting on a platform, built for the purpose, in front of the wagon; that, at the place where the accident occurred, a steam railroad crossed the street at grade with a continuous rail which crossed and cut the track of the defendant, leaving a gap of four or five inches between the thick part of the end of the horse-car rail and the steam-car rail; that the thick part of the defendant's rail, which projected above the level of the top of the rail of the steam railroad, had been cut away so as to allow the wheels of the steam cars to pass without obstruction; that the end of the thick part, where it had been cut away, was broken under, and sharper than a right angle; that as the plaintiff was crossing the track of the steam railroad, his off wheels still running in the outer rail of the defendant's track, he pulled up his horse slightly, and attempted to turn off to the right from the defendant's track; that as the horse, after having passed beyond the further rail of the steam-railroad track, stepped with its off fore foot on to the outer rail of the defendant's track, it sprung down about a quarter of an inch, and the plaintiff's off wheel was caught by the end of the same rail; that the wagon was suddenly stopped, and the plaintiff thrown out and injured; and that, immediately after the accident, and, before the wagon had been moved away from the defendant's rail, the rail was found to be raised up six inches or a foot, and resting against the wheel. The plaintiff testified, on cross-examination, that he slackened the speed of his horse about one third when he arrived within ten feet of the railroad crossing; that the horse was trotting all the time; that he had crossed there a dozen times before; that he did not know there was any danger. *Held*, that, on the above evidence, the questions whether the plaintiff was in the exercise of due care, and whether the defendant was negligent, were for the jury.

TORT for personal injuries occasioned to the plaintiff by reason of the alleged negligence of the defendant. Answer, a general denial. At the trial in this court, before *Lord*, J., there was evidence tending to show the following facts:

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On April 21, 1876, the plaintiff was driving, in the daytime, in an ordinary express wagon, on Cambridge Street, East Cambridge, towards Old Cambridge. He was sitting by the right hand of the wagon seat, which was securely fastened to the body of the wagon, and was driving with a taut rein, with his feet resting on a platform, in front of the wagon, built for the purpose, and protected by an iron rail. The horse was trotting at the rate of from four to six miles an hour, with the off wheels of the wagon in the right hand rail of the defendant's horse railroad.

At the place of the injury, a branch railroad, belonging to the Boston and Albany Railroad Company, crosses Cambridge Street with a double track at grade, with a continuous rail, which crosses and cuts the double track of the defendant, with a gap of four or five inches between the thick part of the end of the horse-car rail and the steam-car rail, for the passage of the steam-car wheels. As the plaintiff was crossing the track of the Boston and Albany Railroad Company, his off wheels still running in the right hand rail of the defendant's double track, he pulled up his horse slightly, and attempted to turn off to the right from the defendant's tracks, and into the space between them and the sidewalk. As the horse turned to the right, after having passed beyond the further rail of the Boston and Albany Railroad track, it stepped with its off fore foot on to the outer right hand rail of the defendant's tracks, which lies next adjacent to the further rail of the steam-railroad tracks, the defendant's rail clattered and moved, or sprung down about a quarter of an inch, and the plaintiff's off fore wheel was caught by the end of the same rail. The wagon was suddenly stopped, the horse thrown suddenly around to the right, and out of the wagon shafts, and the plaintiff was thrown upward slightly by the shock, and forward from ten to twelve feet, striking on the defendant's outer rail and the heavy paving stones adjacent to it. At the moment of the shock, the plaintiff was holding both reins tightly in his hands, and he so held them till he struck the ground. Immediately after the injury, and before the wagon had been moved away from the defendant's rail, with which its off fore wheel had come in contact, the rail was found to be raised up six inches or a foot, and resting against the wheel.

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The defendant's rail, which was of the ordinary pattern in common use in this vicinity, was about four and a half inches wide, about an inch or an inch and a quarter thick on the outside, and considerably less on the inside, forming a flange or projection about three-quarters of an inch high, which served to prevent the defendant's horse-car wheels from leaving the rail. Ordinarily the thin part of the rail was almost on a level with the top of the adjacent rail of the steam railroad, allowing the defendant's horse-cars to pass from its rails over the rail of the steam railroad with as little jolting as possible. The thick part of the defendant's rail projected above the level of the top of the adjacent rail of the steam railroad. About four or five inches of the thick part of the defendant's rail, adjacent to the steam railroad, had been cut away to allow the wheels of the steam cars to pass without obstruction. The end of the thin part of the defendant's rail, left after cutting away the thick part, was about a half or three quarters of an inch from the adjacent rail of the steam railroad, and was thin and sharp. The end of the thick part, where it had been cut away, was broken under, and sharper than a right angle; and there was a section of a spike hole on the outer edge of the thin part of the rail, between the end of the thick part and the end of the thin part; and the spike which was driven there did not hold, the head being worn off and allowing some play. This spike was not pulled out when the rail was pulled up by the wagon wheel, but the three or four spikes in the rail next from this one were pulled out, and had to be removed to allow the rail to fall back in its place. Immediately after the accident, the end of the rail which had caught the wagon wheel was observed to be raised up four inches, and the bend in the rail extended back five or six feet or more. The rail had been observed by the flagman stationed there to be loose for some days before the accident. When horse-cars passed over it the rail would move up and down a little, but not so much when a wagon went over it. The rail was about twenty-five feet long; and, after the accident, on the same day, the rail was fastened down again.

The plaintiff testified, on cross-examination, that he slackened the speed of his horse about a third when he arrived within about ten feet of the railroad crossing; that the horse was trot-

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ting all the time; that he had crossed there a dŏzen times before; that he did not know there was any danger; and was not thinking about the danger of the crossing at the time, and did not think of the crossing, at the time, as dangerous at the rate he was driving; that he slackened up a little when he came to the crossing, because a train of cars might be coming, and had never turned off to the right of the defendant's track at that place before; that he remembered perfectly his horse putting his off fore foot upon the rail; that he heard a clattering noise, and thought that his horse had torn a shoe off; that he looked to see, and saw the rail move about a quarter of an inch when the horse stepped on it, and that, at that moment, he was suddenly thrown out of the wagon; that he held the reins in his hands until he struck the ground; and that the distance from the end of the rail to the point where his horse stepped on it was seven or eight feet.

The flagman employed at the crossing testified that very many vehicles passed daily over this crossing; that he never knew of an accident before; that the horse-car rail "buckled" about one fourth of an inch when a car came on to it, but not so much for a wagon; that he had often noticed the steam-rail do the same; that he had said nothing about it and did not think it dangerous; that a horse stepping on the middle of the rail could not lift the end up; that, since the accident, the horse-car rails had been taken up, new planks put under them, and the rails spiked down again; that if the plaintiff had walked his horse, there would have been no trouble; and that the plaintiff's horse was trotting just as fast when he turned off as at any time, and it looked as if that threw him out him out as much as anything.

This was all the evidence for the plaintiff, except upon the question of damages; and the judge reported the case for the consideration of the full court. If the jury would be authorized to return a verdict for the plaintiff, the case was to stand for trial; otherwise, judgment was to be entered for the defendant.

S. H. Dudley, for the plaintiff.

G. A. Somerby & W. Emery, for the defendant.

SOULE, J. In driving on the highway, the plaintiff was in the exercise of an undisputed right. The defendant, which occupied a part of the highway with its tracks, was bound so to construct

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and maintain the tracks that they should not be an obstruction to public travel on the highway. In the absence of knowledge, or the means of knowledge, to the contrary, the plaintiff had a right to assume that the tracks were so constructed and maintained. There was evidence as to the manner and rate of speed at which he was driving, as to the slackening of speed when he approached the crossing of the Boston and Albany Railroad track and began to turn out from the track of the defendant, which might properly be submitted to the jury, on the question whether he was in the exercise of due care. This is not the case of one who has voluntarily and improperly put himself in a dangerous place, and who therefore cannot recover for injuries received through the negligence of the defendant. It belongs to another class of cases, where the plaintiff, having sustained injury while doing what he had a right to do, must, in order to recover of a negligent defendant, prove affirmatively that he was in the exercise of such care as was appropriate to the place and occasion. If, in such case, there is any evidence on which it is competent for a jury to find that he in fact used reasonable care, the case must be submitted to them, however indicative of carelessness the facts may seem to the court. The court will not decide the question on the preponderance of evidence. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137.

So, too, if there was any evidence from which a jury would be warranted in finding that negligence of the defendant, in the construction or maintenance of its track, caused the injury, the question should be submitted to them, although there might seem to be a preponderance of testimony to the contrary. There was evidence which tended to show that when the plaintiff attempted to turn out of the track of the defendant's railroad, the wheel of his wagon was caught under the end of the thick part of the defendant's rail, which had been cut away so as to leave about five inches space between it and the rail of the Boston and Albany Railroad track, and had been so cut away as to be broken under, and sharper than a right angle. This construction was such that a wagon wheel moving toward it and diagonally across the street, was exposed to the danger of being caught under the projecting end of the rail, whereas, if the rail had been so cut off that the slope was forward and downward, there would

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have been no sharp projection or hook in which a wheel could be caught. Whether, on the whole evidence, the accident was caused by the catching of the wheel in this projection; and if it was, whether the construction of the track of the defendant's road in the manner indicated, at the point where the accident occurred, in view of the amount of travel on the highway, and in view of the crossing of the Boston and Albany Railroad track, was or was not so reasonably safe and convenient as to be no obstruction to travel on the highway, and therefore to show that the defendant was or was not negligent, were questions proper to be submitted to the jury. Whatever may be our views as to the proper answer to these questions, we cannot say that there was no evidence to warrant a finding for the plaintiff.

Case to stand for trial.

ELIZABETH BAYLEY, administratrix, *vs.* EASTERN RAILROAD COMPANY.

STEPHEN SIBLEY *vs.* SAME.

Suffolk. Mar. 25. — July 18, 1878. ENDICOTT & LORD, JJ., did not sit.

In an action for personal injuries occasioned to the plaintiff's intestate by a collision with one of the defendant's trains at a grade crossing of its railroad, the evidence tended to show that the intestate was driving along a highway from which the defendant's road was visible for about half a mile; that the highway approached the railroad at an angle of sixty degrees; that the intestate was sitting in a covered wagon, about two feet back from the forward end of the covering, and was driving at a smart trot until he reached the immediate vicinity of the crossing; that it was early in the evening and pretty dark, although darkness had not fully set in; that there was a gas-light near the crossing, and a gate, which, when closed to indicate the approach of a train, crossed the highway at the opposite side of the railroad to that from which he was crossing; that just before he reached the track on which the train was running, the gate-keeper employed by the defendant began to close the gate, swung his lantern, and shouted to the intestate to stop; that the latter then reined up his horse and brought him to a full stop; that, immediately after this, the gate-keeper shouted to him to hurry up; that the intestate then started his horse, and before getting across the track was struck by the engine, receiving the injuries complained of; and that the bell on the engine was not rung, or the whistle sounded, as required by law. *Held*, that, on this evidence, the jury would be warranted in finding for the plaintiff; and that a request of the defendant to rule that, if the signals required by law were given, there was no evidence which would warrant a verdict for the plaintiff, was properly refused.

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At the trial of an action for personal injuries occasioned to the plaintiff's intestate by a collision with one of the defendant's trains at a grade crossing of its railroad, a witness, who had testified that, at the time of the accident, he was near the defendant's gate-house and saw the gate-keeper go out in a hurry to close the gate, and that he was familiar with the gate and its operation, and with the neighborhood of the gate-house over which the gate-keeper must pass to close the gate, was asked by the plaintiff's counsel, "Whether or not, in your judgment, from the time you saw the gate-keeper leave the gate-house until the train went past the gate-house, there was or was not time for the gate-keeper to go and close the gate?" To this the witness replied, "In my best judgment, he had rather short time, though he might have shut it before the train passed." *Held*, that this answer was a statement of his judgment as to the time which elapsed after the gate-keeper left the gate-house before the train passed it; and that the defendant had no ground of exception to its admission.

TWO ACTIONS OF TORT. The first was for personal injuries to the plaintiff's intestate, Stephen Bayley, occasioned by a collision with one of the defendant's trains at a grade crossing of its railroad over Everett Avenue, in Chelsea. The second was for injuries to the plaintiff's horse and wagon, while being driven by Bayley, his servant, from the same cause.

At the trial in the Superior Court, before *Bacon*, J., the jury returned a verdict for the plaintiff in each case; and the judge allowed a bill of exceptions, the material parts of which appear in the opinion.

S. Lincoln, Jr., for the defendant.

E. O. Shepard, for the plaintiffs.

SOULE, J. There was evidence in the case that the accident happened about eight o'clock in the evening of August 19, 1876; that there was no moon, and it was pretty dark, though the darkness had not fully set in; that the weather was fair; that the intestate, Bayley, was driving along a highway from which the road of the defendant was visible for about half a mile; that the highway approached the railroad at an angle of sixty degrees; that Bayley was sitting in a covered wagon, about two feet back from the forward end of the covering, and was driving at a smart trot until he reached the immediate vicinity of the crossing; that there was a gas-light by the crossing, and a railroad gate, which, when closed to indicate the approach of a train, crossed the highway at the opposite side of the railroad to that from which he was coming; that, just before he reached the track on which the train was running, the gate-keeper employed by the

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defendant began to close the gate, and shouted to Bayley to stop, and swung his lantern, and thereupon Bayley reined up his horse, and brought him to a full stop; that, immediately after this, the gate-keeper shouted to Bayley to hurry up, and Bayley started his horse, and, before getting across the track, was struck by the engine and hurt, and the horse and wagon, the property of the plaintiff in the second case, were damaged. There was also evidence that the bell on the engine was not rung, nor the whistle sounded, as required by law.

On this evidence, the learned judge who tried the case properly refused to rule that the jury would not be justified in finding a verdict for the plaintiff in either case. If the jury were satisfied that the defendant neglected to give the signals, by ringing the bell or whistling, required by the St. of 1874, *c.* 372, § 123, the plaintiffs would be entitled to recover, unless it was shown that Bayley was guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury. St. 1874, *c.* 372, § 164. The plaintiffs were therefore entitled to go to the jury on the question whether the defendant gave the signals or not. The exception taken to the terms of the ruling given to the jury on this point was waived at the argument.

A question remains on the refusal to rule that, if the signals were given, there was no evidence which would warrant a verdict for the plaintiffs. We are of opinion that such ruling, if given, would have been erroneous. It was an open question whether Bayley had not calculated with accuracy that he had time to cross the track before the engine reached the crossing, and whether he would not have crossed in safety but for the outcry of the gate-keeper, calling on him to stop, and whether he used that degree of care which a man of ordinary prudence would use in such a situation, in attempting to cross in the first instance, in stopping at the suggestion of the gate-keeper, and in starting again at his invitation.

The case is not governed by the principle which applies when a person, without any reason of necessity or propriety to justify him in doing so, puts himself in a place of exposure to injury, and he is not permitted to recover for such injury, though able to show that negligence of the other party contributed to pro-

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duce it. It is rather one of those cases in which a railroad company, having made arrangements for the accommodation of persons crossing the track of its road, so manages in a particular instance that its conduct may furnish a justification to the party injured for being on the track. And although the burden, in such cases, is still on the plaintiff to show the exercise of such care as a man of ordinary prudence would exercise under like circumstances, the question whether he did so or not is to be determined by the jury after considering all the circumstances surrounding the event. It is not the duty of the court to decide the question on the preponderance of the evidence. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227.

The only remaining exception is to the admission of a question put to Alexis Read by the plaintiffs. This witness testified, without objection, that he was near the gate-house, and saw the gate-keeper go out in a hurry to close the gate; that he was familiar with the gate and the neighborhood of the gate-house, over which the gate-keeper must pass to close the gate, and knew how the gate was operated. The plaintiffs then asked this question: "Whether or not, in your judgment, from the time you saw the gate-keeper leave the gate-house until the train went past the gate-house, there was or was not time for the gate-keeper to go and close the gate?" To this question the defendant objected, but the judge permitted the witness to answer, and he replied, "In my best judgment, he had rather short time, though he might have shut it before the train passed, but he had short time."

The objection to this evidence is apparent rather than real. The question was not put nor answered for the purpose of getting the opinion of the witness as to the length of time which the gate-keeper would require in order to travel a given distance, which would have been open to objection, as being a matter as to which the witness had no better means of judging than the jurors or any other adults had. The purpose and effect were to get at the opinion of the witness as to the time which elapsed after the gate-keeper started from the gate-house, before the train passed the gate-house. Evidence on this point was pertinent, on the question of negligence of the defendant. That the question

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called for and the answer gave only opinion does not make the evidence incompetent. All statements as to the lapse of time between two occurrences are opinions merely, unless the person inquired of measured it by a time-piece; but the opinion of witnesses on this subject is taken every day, without objection. It is the judgment of one who had the means of observation, but took no special steps to preserve an accurate recollection. The judgment is quite as likely to be correct when the length of time is stated as being as long as it would take to walk a given distance, as when it is stated in minutes or seconds.

Exceptions overruled.

SENECA PETTEE *vs.* JOHN W. PEPPARD.

Suffolk. March 6. — July 19, 1878. COLT & SOULE, JJ., absent.

Under the Gen. Sts. *c.* 103, §§ 33, 34, if two parcels of land, one subject to a mortgage and the other not, are taken on execution as the property of a debtor, it is not incumbent on the appraisers to deduct the mortgage debt; the levy is not invalid because both parcels are appraised together as one estate, and no deduction is made from the appraisal on account of the mortgage; and the fact that the creditor supposed that the mortgage had been paid and failed in an attempt to contest its validity does not invalidate the levy on the other lot.

WRIT OF ENTRY to recover a parcel of land in Boston. Plea *nul disseisin*. After the former decision, reported 120 Mass. 522, the case was submitted to the Superior Court on agreed facts, in substance as follows:

The demandant claims the demanded premises by levy on execution, on February 4, 1874, against Henry K. Appleton, the attachment being made on June 28, 1871.

On November 9, 1857, William E. Blanchard, who then owned a portion of the demanded premises, mortgaged this portion to Elizabeth Child; and on July 5, 1864, conveyed this estate subject to the mortgage, which the grantee was to assume and pay, to Henry K. Appleton. He also conveyed to him in the same deed a small parcel of land adjoining, which he had acquired since the date of the mortgage, and which was not included therein. On October 8, 1869, Child assigned the mortgage to Elizabeth Batterman, who died testate, and said Ap-

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pleton was duly appointed executor of her will. After verdict had been rendered against Appleton in the action in which the land was attached, but before final judgment, Appleton, on August 20, 1873, entered on the mortgaged premises, for breach of condition of the mortgage, and on October 20, 1873, assigned the mortgage to the tenant, who paid full value for it, and the proceeds were used to pay legacies of the testatrix. Since the assignment, the tenant has received rent, paid taxes and made repairs.

The levy of the execution was upon the mortgaged lot, and upon the small lot adjoining, describing them by metes and bounds as one lot, as though unincumbered, and nothing was deducted from the appraisement on account of any amount due upon the mortgage. At the time of making the levy, the judgment creditor knew of the mortgage, but considered and treated it as paid, as contended at the former trial.

The demandant now claims title only to the small lot not covered by the mortgage. The tenant contends that, as no deduction was made for the mortgage in the proceedings under the levy, the proceedings were invalid and the demandant acquired no title thereunder. Such judgment was to be entered as to the court should seem proper.

Gardner, J., ordered judgment for the demandant for the small lot; and the tenant appealed to this court.

W. F. Slocum, for the demandant.

A. A. Ranney, for the tenant.

AMES, J. It is well settled that a mortgaged estate may be levied upon and set off by metes and bounds in the same manner as if it were not so incumbered, provided the creditor is content to take it subject to the incumbrance. It is manifest that in this case the judgment creditor acted upon the assumption that the mortgage had been paid in effect and that he intended to contest its validity. No deduction was made from the appraised value of the estate on account of the existence of the mortgage, but the entire estate was appraised and set off at its full valuation towards the satisfaction of the execution. The existence of the mortgage would not prevent the debtor's freehold estate and interest in the land from passing by the levy. *White* v. *Bond*, 16 Mass. 400. *Mechanics Bank* v. *Williams*, 17

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Pick. 438. *Root* v. *Colton*, 1 Met. 345. The fact that the creditor was mistaken in his assumption that the mortgage had been paid, and, therefore, failed in his attempt to contest its validity, would have no effect to defeat the levy on land not included in the mortgage. "If one conveys by deed more land than he owns, the deed is good for what he does own. So if an execution be levied upon one hundred acres, and the debtor had a title but to fifty, the levy is good for the fifty." *Atkins* v. *Bean*, 14 Mass. 404. *Castle* v. *Palmer*, 6 Allen, 401. *Mechanics Bank* v. *Williams*, 17 Pick. 438. *Root* v. *Colton*, 1 Met. 345.

We cannot agree with the argument in behalf of the tenant that either § 33 or § 34 of the Gen. Sts. *c.* 103 makes it imperative upon the appraisers to deduct the mortgage debt, in any case where the creditor chooses to make the levy without such deduction. The fact that some of the parcels of land levied upon were mortgaged and some were not does not impair the validity of the levy, even if all were included in one appraisal. *Hannum* v. *Tourtellott*, 10 Allen, 494. Gen. Sts. *c.* 103, § 6. As to so much of the land levied upon as was not included in the mortgage, viz., the smaller lot, the demandant is entitled to judgment.

Judgment affirmed.

JOHN BREWSTER & others *vs.* WELLINGTON BURNETT.

Suffolk. March 11. — July 19, 1878. COLT & SOULE, JJ., absent.

A purchaser of counterfeit bonds of the United States, in whose possession they are, need not return such bonds before bringing an action to recover back the money paid by him for them.

A purchaser of counterfeit bonds of the United States, which are afterwards redeemed by the United States, may bring an action to recover back the money paid by him for them before repaying the United States.

CONTRACT to recover back money paid, on September 28, 1867, for certain forged and counterfeit bonds of the United States. Writ dated September 24, 1873. Trial in the Superior Court before *Putnam*, J., who directed a verdict for the plaintiff, and reported the case for the consideration of this court. If the ruling was correct, judgment was to be entered

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on the verdict; otherwise, a new trial was to be ordered or such order made as the court might direct. The material facts appear in the opinion.

C. R. Train, for the defendant.

C. T. Russell & C. T. Russell, Jr., for the plaintiffs, were not called upon.

ENDICOTT, J. This action is brought against the defendant, as surviving partner of the firm of Burnett, Drake & Co., by whom the bonds were sold to the plaintiffs. It appears that upon the dissolution of the firm a sufficient sum was retained by the defendant to pay the claim of the plaintiffs. Immediately after the purchase, the bonds were redeemed by the sub-treasurer of the United States, at New York, and the plaintiffs received full value for the same, upon the agreement and understanding that, if for any reason they were returned from Washington, they should be taken back by the plaintiffs and others substituted in their place or the money repaid. They were returned in a few days to the sub-treasurer as spurious and counterfeit. The plaintiffs were notified to redeem them, and gave notice at once to the firm that the bonds had been returned as spurious, and they should hold the firm liable for their full amount. An action was brought by the United States against the plaintiffs to recover the amount paid by the sub-treasurer, and suits were at the same time begun against other parties to recover money paid under like circumstances upon bonds of a similar character. The question arose in regard to defending these suits, and the defendant stated that the suit against Jay Cooke & Co. was to be a test case, and it was agreed that the plaintiffs should pay a proportional part of the expense of defending it, to be repaid to them by the firm. The firm paid their proportional part of the expenses with other parties, as called upon by the plaintiffs. But the plaintiffs made no contribution, not considering themselves liable. It is obvious that this arrangement was made for the benefit of the defendant's firm.

Before the suit against Jay Cooke & Co. was decided, and within six years from the sale of the bonds, the plaintiffs brought this action against the defendant, as surviving partner, to recover the amount paid for the bonds on the ground that they were forged and counterfeit. See *Cooke* v. *United States*, 91

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U. S. 389; *S. C.* 12 Blatchf. C. C. 43. But the case was not tried until after the decision of *Cooke* v. *United States*, and after the plaintiffs had settled with the United States according to the obligation entered into at the time the bonds were redeemed by the sub-treasurer. The bonds were cancelled in the usual manner when redeemed, and have since remained in the possession of the United States. They were produced at the trial by the district attorney of the United States for Massachusetts, who consented to leave them in charge of the court for the purpose of the trial. The plaintiffs have not tendered them to the defendant, and whether they could have been obtained from the United States for that purpose does not distinctly appear. The sub-treasurer was asked at the trial whether he had authority to do so, and, on objection by the defendant, the evidence was excluded. Upon these facts, we are of opinion that the verdict must stand. Only two questions are raised by the defendant.

It is first contended that this action cannot be maintained without returning the counterfeit bonds to the defendant. It has been settled in this Commonwealth that the return of a counterfeit bank note is not essential to the maintenance of an action against the party from whom it was received; that it is entirely worthless, and an offer to return it would be an idle ceremony. *Kent* v *Bornstein*, 12 Allen, 342. *Perley* v. *Balch*, 23 Pick. 283. In *Coolidge* v. *Brigham*, 1 Met. 547, relied on by the defendant, the promissory note was not worthless, for, while the indorsements upon it were forged, the signature of the maker was genuine; and in *Bassett* v. *Brown*, 105 Mass. 551, 557, the stock, although it had little or no market value, was genuine, and it was not shown that the defendant might not have derived some benefit from the shares, if returned at the proper time. Even admitting that the defendant in this case might have derived some benefit from the return of the bonds at the proper time, if he had been able to find the party from whom they were received, it is clear he would not have been entitled to a return while the suit was pending in the courts of the United States for his benefit; and it appears from the evidence reported, and it could well have been found by the jury, that the defendant had no means of ascertaining and was utterly unable to ascertain who the party was. It also appears that the

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defendant has the same power to obtain the bonds as evidence against such party, if he should be found, that the plaintiff had at the trial of this case.

The defendant also contends that the plaintiffs had suffered no loss when this suit was brought, and had no cause of action against the defendant, until they repaid the United States, which they did not do till after the date of the writ. This is not an action wherein the plaintiffs seek to recover indemnity for money paid to the United States, but to recover for money paid to the defendant's firm for forged bonds upon the express or implied warranty that they were genuine. No question is made that the bonds purchased were forged and counterfeit, nor is it questioned that the United States were entitled to immediate repayment, by the plaintiffs, of the money paid to them by the sub-treasurer at New York. The plaintiffs, therefore, could have maintained an action against the defendant at any time within six years from the sale. The fact that, for certain purposes and for the benefit of the defendant, it was agreed that the plaintiffs should not repay the United States until the test case was decided, could not affect the right of the plaintiffs to bring an action; although it may fairly be inferred from the arrangement between the parties that the defendant should not be called upon to pay the plaintiffs until the question was decided in the United States courts; consequently, the trial of such an action if commenced should be delayed until that time had arrived, which was the course pursued. The plaintiffs were from the first liable to the United States under their obligation to repay the money received, and this case stands precisely as if the action had been begun before the parties made the agreement. See *Kent* v. *Bornstein*, 12 Allen, 344.

Judgment on the verdict.

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LEONARD R. CUTTER *vs.* HENRY RICHARDSON & another.

Suffolk. March 12. — July 19, 1878. COLT & AMES, JJ., absent.

A surety on a bond, given to dissolve an attachment, is not discharged by the plaintiff's being allowed to file, without notice to him, an amended count, which does not change the cause of action, but merely states it more in detail than the original count.

If a general verdict is returned on a declaration containing two counts, one filed after a bond to dissolve an attachment is given, and without notice to a surety thereon, the surety is not discharged, if it appears from the record that the verdict could not have been rendered on this count.

CONTRACT against the sureties on a bond given to dissolve an attachment in an action brought by the plaintiff against Henry F. Howe and others, by writ dated December 22, 1874. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

The first count of the declaration in the original action was on an account annexed, to recover $576.50, for the use and occupation of certain premises hired of the plaintiff by the defendants. The account annexed contained two items. The first was for the balance due for rent, November 1, 1874, amounting to $270. The second was for $306.50, the rent for the month of November, 1874.

The second count was to recover $576.50 rent, under a written lease, a copy of which was annexed. By the terms of the lease, rent was reserved at the rate of $166.66 a month.

The third count alleged that the defendants on July 1, 1873, hired of the plaintiff a certain house, being the same mentioned in the preceding counts, and agreed to pay the plaintiff $83.33 a month, while certain alterations and repairs were being made by the plaintiff, and, at the completion of these alterations and repairs, to pay the plaintiff, monthly, at the rate of $3500 a year, and a percentage of the cost of the alterations and repairs, and of the abatement on the rent while they were being made; that repairs were made at a certain cost; that the defendants occupied the house under the agreement until February 1, 1875, and paid the plaintiff rent monthly until October 1, 1874; and that they owed him $613, rent for the months of October and November, 1874, less $220 paid on account for the month of October.

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The fourth count was on a written lease, a copy of which was annexed, from Jonas B. Hitchings to the defendants, of the same premises; and alleged a sale of the reversion to the plaintiff, and an attornment to him by the defendants; an occupation until February 1, 1875; and that rent was due for the months of October and November 1874, at the rate of $166.66 a month, as reserved in the lease.

The docket and files of the original action showed that the judge, trying the case without a jury, found for the plaintiff for $628.28, of which the plaintiff subsequently remitted the sum of $225.56.

It was admitted that judgment was entered for the plaintiff in the original action for the balance; that the execution issued thereon was returned unsatisfied; and that the third and fourth counts were allowed as amendments to the declaration, without notice to the sureties on the bond, and without their knowledge.

The defendants asked the judge to instruct the jury as follows: "1. The filing and allowing of the amendments to the declaration in the original action, without notice to the defendants in this action, and without their knowledge, discharged them from their liability as sureties upon the bond. 2. The finding in the original action being general, the court cannot say upon which count it was based, no evidence being offered to show upon which count it was based."

The judge declined so to instruct the jury, but did instruct them that the second and fourth counts of the declaration in the original action, being for two months' rent, under a lease fixing the rent at $166.66 per month, would not support the finding of the court in that case, the amount showing it must have been made on some other count; that the third count, filed and allowed by way of amendment, differed from the first only in stating in detail the mode in which the monthly rent, claimed in the first count, was ascertained and agreed upon; that it was for the occupation of the same premises, at the same rent and for the same length of time; that the amendments introduced no new cause of action; and directed the jury to return a verdict for the plaintiff. The defendants alleged exceptions.

C. R. Train & J. O. Teele, for the defendants.

A. E. Pillsbury, for the plaintiff.

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ENDICOTT, J. The declaration in the original action contained two counts: the first for use and occupation of certain premises according to an account annexed; the second, for rent of the same premises according to the terms of a written lease. After the bond now in suit was given, the plaintiff, without notice to these defendants, filed two additional counts. The third count, so filed, is obviously an amendment to the first, and the fourth to the second count of the original declaration. The defendants contend that these counts introduced a new cause of action, and that they are discharged from their liability as sureties on the bond; and also that, as the finding of the judge in the original action was general, the court cannot now say upon which count it was based.

But it is evident, from an inspection of the record, that the finding of the judge in the original action was not based upon the second and fourth counts. Under the second count, as amended by the fourth, rent at the rate of $166.66 per month, for two months only, could be recovered; under the first count, as amended by the third, $306.50 per month, for use and occupation during the same period, could be recovered, deducting therefrom $220, paid by the tenant on account. The original finding of the judge was for $628, evidently based upon the first and third counts, but failing to allow the credit stated in the third count. This error was corrected by the plaintiff remitting a portion of the finding. It is clear, from this recital, that the amount thus finally determined, which is much in excess of any sum that could be found due under the second and fourth counts, could not have been based on those counts, but must have been on the first and third counts. See *Brown* v. *Howe*, 3 Allen, 528.

Nor can it be said that the third count, in amendment of the first, introduced any new cause of action whereby these defendants were discharged. It was for use and occupation of the same premises, at the same rent, for the same length of time. It differed from the first only by stating in detail the mode in which the sum payable per month, for use and occupation of the premises, was ascertained and agreed upon, and contains a credit for money paid by the tenant, not stated in the first count.

The rulings at the trial were therefore correct. See *Mann* v. *Brewer*, 7 Allen, 202; *Wood* v. *Denny*, 7 Gray, 540, 542, and cases cited. *Exceptions overruled.*

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ABBY JOHNSON *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 14. — July 19, 1878. COLT, J., absent. LORD, J., did not sit.

If a person buys a ticket which entitles him to a passage over a railroad from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterwards, while on his way to the station of another railroad corporation near by, for the purpose of meeting his son, returns to the station which he had left, and is injured while crossing the tracks, through the negligence of the railroad corporation which had sold him the ticket, when he might have crossed the railroad at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence was wilful, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the track, and people have been accustomed to pass from the station on one railroad to that on the other at that point, without objection by the corporation; and although his ticket does not forbid stopping over at B.

TORT for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant.

Trial in the Superior Court, before *Wilkinson*, J., who, after verdict for the defendant, reported the case for the determination of this court in substance as follows:

The plaintiff offered evidence tending to show that on December 4, 1875, she purchased a ticket at the defendant's office in Boston, entitling her to be carried over the defendant's road from Boston to Lawrence, and thence, over the Manchester and Lawrence Railroad, to Manchester, New Hampshire; that the ticket had coupons attached, and contained no limitations as to the time when it was to be used, and was silent as to the right of the party holding it to stop over at any point on the line; that she took the train leaving Boston about noon, and, having occasion to stop at Somerville on the line of the defendant's road, in order to see her son, whom she was expecting by a train upon the Eastern Railroad, at the station of the latter road in Somerville, a few rods distant from the defendant's station, she stepped from the train at the defendant's station in Somerville, intending to resume her journey by another train on the defendant's road, which would leave Boston at five o'clock on the same day; that after leaving the car she proceeded to a house near by the station; that the defendant's station and grounds at Somerville extend the entire distance between Cambridge and Perkins streets,

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both of which streets the railroad crosses at grade, and both of which are provided with gates; that there are two tracks running north and south, parallel to each other and about four feet apart; that the principal station is on the west side, and there is a platform adjacent to the track, raised about eight inches above the track, and extending the entire distance between Perkins Street on the north and Cambridge Street on the south; that upon the opposite or east side of the track and adjacent to it, a platform similar to that upon the west side extends the entire distance between Perkins and Cambridge streets, and meets each highway at a level; that a narrow planking extends on the west side of the track the whole length of the western platform, between the platform and the extreme western rail, and even with the top of the rail; that a similar space between the extreme eastern rail and the eastern platform is not planked; that a planking even with the top of the rails extends between the eastern rail of the western track and the western rail of the eastern track, the entire distance between Cambridge Street and Perkins Street; that there is no planking between the rails of either track, but a solid filling of earth fills up the space even with the top of the sleepers; and that all the platforms and plankings referred to extend a distance of two hundred and twenty feet, and all of them connect either at a level or by suitable approaches with the sidewalks of each street.

The plaintiff testified that she waited at the house where she was stopping until nearly half past one, the time when the train upon the Eastern Railroad which she expected to meet was due; that she then started to go to the Eastern Railroad station, and proceeded upon Perkins Street to the crossing of the defendant's railroad, when a train of the defendant's, passing southward on the track nearest her, prevented her going further at that moment; that this train stopped at the Somerville station of the defendant; that she thereupon stepped upon the northern end of the defendant's western platform, close to which the train was standing, and walked southward along the platform by the side of the train; that she was informed as to the position of the Eastern Railroad station, and stopped upon the platform about fifty or sixty feet from Cambridge Street, waiting for the train to pass on by her towards Boston; that, as soon as the last car

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passed, she immediately stepped down and cast her eye to the north; that she then walked rapidly across upon the planking which extended to the track, across this track, and the planking dividing this from the second track, and upon the second track, and had got both feet upon the second track, when a train from Boston going north struck her and caused the injuries complained of; that the whole time occupied by her after leaving the platform and before she was struck was not more than three seconds; that she looked north first, because she supposed a train would not be coming from the south while the first train was going out; and that as quickly as possible after looking north she looked south.

Upon cross-examination, she testified that she did not look to the south, in the direction from which the engine which struck her approached, until she was upon the track upon which it came; and that, at the time of the accident, she was not familiar with the premises, and had not to her remembrance been there before. Evidence competent to be submitted to the jury was offered tending to show due care on the part of the plaintiff and negligence of the defendant at the moment of the accident.

The plaintiff offered to show that the train standing by the platform extended entirely across Cambridge Street, which is one of the streets by which the plaintiff could reach the Eastern station; that the planking and the road-bed between the rails made a convenient and substantially level passageway for foot passengers to cross from platform to platform, and was the most direct course for the plaintiff to take to the Eastern station; that this state of things had existed for many years; that passengers purchasing tickets at the Somerville station to go north, cross the first or western track to the planking between the tracks, or both tracks, to the platform on the eastern side; that persons going east or west can use Perkins Street north of the station, or Cambridge Street south of the station, but for persons walking from a point on Perkins Street near the north end of the station to the Eastern Railroad station, a nearer and more convenient way is to pass over a portion of the defendant's platform and across the tracks of the defendant's road, as the plaintiff was about to do; that, at the time of the accident and for a long time before, it had been customary for passengers, and all other

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persons having occasion to pass, to use the defendant's platforms and the space between as a common passageway or thoroughfare; that no notice or warning to the contrary had ever been posted by the defendant corporation; and that large numbers of passengers and other persons were in the daily habit of so using the premises.

The Eastern Railroad station is at a point south of Cambridge Street, while that of the defendant's is north of that street. The station of each corporation is accessible by the ordinary highways of the neighborhood without crossing any premises of the other corporation. In crossing from the western portion of the station of the defendant to the Eastern Railroad station, all the tracks of both corporations are crossed at grade.

Upon this evidence, the judge ruled that the action could not be maintained; ordered a verdict for the defendant; and reported the case for the determination of this court. If the action could be maintained, the verdict was to be set aside and the case stand for trial; otherwise, judgment was to be entered on the verdict.

N. B. Bryant, for the plaintiff.

S. Lincoln, Jr., for the defendant.

SOULE, J. The evidence in this case shows that when the plaintiff was injured she was a mere intruder on the premises of the defendant. Though she had bought a ticket which entitled her to be carried by the defendant from Boston to Lawrence, and had been carried from Boston to Somerville, by virtue of that ticket, her own testimony showed that she was not on the premises as a passenger, who, having alighted from the train, was on her way from the station; nor as a passenger about to take an outgoing train; but that she was there merely for her own convenience, using the premises as a passageway from the highway to the station of the Eastern Railroad Company, at which she expected to meet her son, a passenger over the Eastern Railroad. The evidence fails to show that the defendant held out any inducement to her to enter its premises. There is nothing in the arrangement of platforms beside the tracks, extending from street to street, nor in the construction of the road-bed between the rails of the several tracks, which indicates that they were intended for the use or accommodation of others than the em-

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ployees and passengers of the defendant; and it does appear that the arrangement of the premises was such as a due regard for the safety and convenience of passengers required. The use of the premises as a passageway by strangers was a matter in which the defendant was absolutely passive, and from which nothing is to be inferred in favor or in aid of the plaintiff.

It is clear, therefore, that the defendant was not bound to do any act or service for the plaintiff, nor to fulfil any contract with her, relating to the use by her of its lands, nor for the purposes for which she was using them when she was injured. In going upon the railroad track in order to make a short cut to the station of the Eastern Railroad, she assumed all risks of bad condition of the platforms and of the road-bed, and of the running of engines and cars. It not being alleged nor contended that the injury was wilfully inflicted, no state of facts was established which can be the foundation of an action of tort. No obligation or duty toward the plaintiff existing, the defendant could not be guilty of violating any duty or obligation toward her. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368. *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208. For these reasons, the ruling that the action could not be maintained was correct, and it is unnecessary for us to consider the other questions which were argued by counsel. *Judgment on the verdict.*

JAMES A. LOVEJOY *vs.* BOSTON AND LOWELL RAILROAD CORPORATION.

Suffolk. March 14. — July 19, 1878. COLT, J., absent. LORD, J., did not sit.

In an action brought by an employee against a railroad corporation for an injury caused by his head coming in contact with a signal-post by the side of the track, and three feet and eight inches distant therefrom, while leaning outside of the locomotive engine and looking back to get a signal from the conductor, it appeared that the plaintiff knew of the signal-posts, but had not noticed the one in question before the accident, though, before looking back, he had looked ahead and seen no obstruction, and that there were many other structures on the line of the road at the same distance from it. *Held*, that the action could not be maintained.

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TORT for personal injuries occasioned to the plaintiff while in the employ of the defendant as a locomotive engineer. Answer, a general denial. Trial in this court, before *Endicott*, J., who reported the case for the consideration of the full court, in substance as follows:

The plaintiff testified that, at the time of the accident, he was running a passenger train from Lowell to Boston; that at Winchester, a station on the defendant's road, it was the custom to detach cars from the rear of the train, and leave them at that point; that this was accomplished by starting the train and running a short distance, then shutting off steam so that the brakeman could pull the pin and detach the cars, and then the conductor was accustomed to pull the cord attached to a bell upon the locomotive, as a signal for the train to proceed; that sometimes the bell would not ring; that on the morning of the accident the plaintiff shut off steam, but the signal-bell was not sounded; that he looked through the window of the cab, saw no obstruction, and stepped upon the projection of the tender-frame, and leaned over outside of the locomotive, holding on to the side of the locomotive with his hands, for the purpose of obtaining a signal from the conductor (namely, the waving of his hand as he stood on the platform between the cars); that when he leaned from the side of the locomotive, the back of his head and neck, immediately behind the ear, came in contact with the post hereafter described, and he was thrown from the locomotive and received the injuries complained of; that engineers were in the habit of looking for a signal in this way, and it was a proper course of action; that the morning was cold and frosty, and the cab-window was covered with frost from the escaping steam from a small leak in the dome of the locomotive, but he wiped it off so that he could see out; and that it was too cold to run with the window open. On cross-examination, he testified that he recollected nothing after beginning to lean over outside of the locomotive, and he could not tell whether he intended to look back at once for the signal, or first to look ahead for obstructions.

It appeared that, the fall before the accident, which occurred in January, the defendant erected upon the line of its railroad, between Winchester and Boston, Hall's electric signals, but, at

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the time of the accident, they had not been fully completed and put in operation. The signal-post against which the plaintiff struck was about twelve feet in height and ten inches square, having on its top a circular signal-box, about three feet in diameter, intended to display a signal to the engineer of any obstruction upon the track. It was placed three feet and eight inches from the main track on which the plaintiff was running, and half-way between that track and a parallel side-track; and there was nothing to obstruct the view of it for nearly half a mile up or down the track in either direction.

The plaintiff further testified that he was a spare runner, taking the place of the regular engineers on the various roads operated by the defendant, as occasion required; and that he had noticed that these signals were being erected on the line of the railroad, but had not, previously to the accident, noticed the signal-post in question.

The locomotive in use by the plaintiff projected one foot and four and one-half inches, and the passenger cars projected from twenty-five to twenty-seven inches, from the rail.

It was agreed, if competent for the defendant to prove it, that the abutments of some forty-six bridges, on which highways pass over its railroad between Boston and Lowell, and numerous buildings, station entrances, &c., were as near the track as the post in question; that the defendant's was a double-track road; and that trains in passing, both upon this road and upon most others, were nearer to each other than the plaintiff's train passed to the post in question.

An expert, introduced by the defendant, testified, upon cross-examination, that, where circumstances did not prevent, he did not consider it prudent to erect any object nearer the rail than four and one-half feet; that a majority of the bridges and other structures on the defendant's road were at that distance; that such was of late years the usual custom; and that there was no reason why the post in question could not have been set outside of the side-track. It was also agreed, if competent, that the post had been moved to that position by the defendant after the accident.

The defendant contended that, upon this evidence, the plaintiff was guilty of negligence, which, as matter of law, would

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preclude his recovery; and that there was no evidence of negligence on the part of the defendant. The plaintiff contended that both these questions were for the jury; whereupon the judge reported these questions for the consideration of the full court. If, as matter of law, the plaintiff was guilty of such negligence as to preclude a recovery, or if there was no evidence of negligence on the part of the defendant, judgment was to be ordered for the defendant; otherwise, the case was to stand for trial.

G. A. Torrey, for the plaintiff.

J. H. George, (of New Hampshire,) for the defendant.

ENDICOTT, J. The plaintiff was in the employment of the defendant as a locomotive engineer. The electric signal-posts, against one of which the plaintiff struck when leaning outside his locomotive and looking back, to take a signal from the conductor, were placed three feet and eight inches from the track, and were two feet and a half from the outside of a passing locomotive. They were conspicuous objects ten feet in height, with a signal-box on top, three feet in diameter, and the post in question was visible for nearly half a mile in either direction. The abutments of forty-six bridges, numerous buildings, entrances to stations and other structures on the line of the defendant's road, were the same distance from the track. These facts were known to the plaintiff, though he testified that he had not, previously to his alleged injury, noticed this particular post. The only negligence imputed to the defendant was in placing this post so near the track.

As between the plaintiff and the defendant, it was immaterial whether it would have been more prudent to have placed the signal-posts, abutments of bridges and other structures, so numerous on the line of the defendant's road, more than three feet and eight inches from the track. If there was any danger to the plaintiff, while in the performance of his duty, from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, the proximity to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner, and, as was said in *Ladd* v. *New Bedford Railroad*, 119 Mass. 412, "is

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not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom." *Judgment for the defendant.*

WILLIAM M. BATES, administrator, *vs.* CHARLES C. BARRY & others.

Suffolk. March 14. — July 19, 1878. COLT & LORD, JJ., absent.

This clause in a will, "I order that $500 per year for ten years be paid over to" A. in equal quarterly payments, gives A. an annuity contingent on his living so long, and not a legacy of $5000, payable in instalments.

CONTRACT by the administrator of Ann G. Bates, against the trustees under the will of Charles W. Cartwright, to recover the balance of a legacy given to Bates by the will. The case was submitted to the Superior Court, and, after judgment for the plaintiff for $38.76, to this court, on appeal, on an agreed statement of facts in substance as follows:

Charles W. Cartwright died on August 12, 1873, leaving a will by which he gave to the defendants all of his estate in trust, to be disposed of as therein directed. The will contained, besides several legacies and annuities, the following: "I order that $500 per year for ten years be paid over to my niece Ann G. Bates," in equal quarterly payments. By another clause in the will he provided as follows: "I give to each of my sisters, Sarah C. Hussey and Mary C. Ewer, $500 per annum during their respective lives; and in the event that my income should fall short of paying the annuities herein granted, I request that all except the two to my two sisters may be reduced *pro rata* according to the amounts given."

Ann G. Bates died on November 28, 1876, and the plaintiff was duly appointed her administrator. The payments made to her in her lifetime, up to and including that of October 3, 1876, were reduced *pro rata* according to the income of the estate, which has fallen considerably short of an amount sufficient to pay all the annuitants in full, and the reduction so made

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amounted to the sum of $337.50, and the sums paid to her since the decease of Cartwright amounted to $1230.56. The payments made to her during her lifetime were made quarterly as nearly as practicable, on the first days of January, April, July and October. No payment has been made since that of October, 1876.

If, on these facts, the plaintiff was entitled to recover any sum, judgment was to be entered for him accordingly; otherwise, judgment for the defendants.

A. Russ, for the defendants.

L. Marrett, for the plaintiff, contended that the gift was of $5000, and cited *Shattuck* v. *Stedman*, 2 Pick. 468; *Furness* v. *Fox*, 1 Cush. 134; *Eldridge* v. *Eldridge*, 9 Cush. 516.

SOULE, J. The clause in the will, "I order that $500 per year for ten years be paid over to my niece, Ann G. Bates," gave her an annuity, and not a legacy of $5000, payable in instalments. *Brimblecom* v. *Haven*, 12 Cush. 511. *Stephens* v. *Milnor*, 9 C. E. Green, 358. It was, therefore, by the terms of the will, payable quarterly, and subject to abatement if the income proved insufficient to pay all the annuities in full. The plaintiff consequently has made no case for recovery of any arrearages of the annuity payable on or before October 1, 1876.

As there are no words of inheritance or succession in the bequest, it must be construed as giving an annuity for ten years, if the annuitant should survive the testator so long; and if she should not, for her life only. *Blewitt* v. *Roberts*, Cr. & Ph. 274. *Yates* v. *Maddan*, 3 Macn. & Gord. 532. *Savery* v. *Dyer*, Ambl. 139. The annuity, being payable from the income of the estate, is within the provisions of the Gen. Sts. *c.* 97, § 24, and the plaintiff is entitled to recover a proportional part, for the time between the 1st day of October, 1876, and the 28th day of November of the same year, both inclusive. As the income appears to have been so reduced that the annuity was cut down one half, the apportionment is to be made on the quarterly sum of $62.50. The judgment of the Superior Court was evidently made up in accordance with the rules of law applicable to the case, and must be *Affirmed.*

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LOUIS W. BURNHAM *vs.* GEORGE N. NOYES.

Suffolk. March 20, 21. — July 19, 1878. AMES & MORTON, JJ., absent.

On the issue whether the conversion of personal property was fraudulent, so that an action therefor would not be barred by a discharge in bankruptcy of the defendant, the burden of proving the fraud is on the plaintiff throughout the case; and an instruction that, if the defendant did any acts in relation to the property which were unlawful, the burden was on him to prove that he acted honestly, is erroneous.

TORT for the conversion of a check, dated October 30, 1873, signed by George N. Noyes & Co. payable to the order of Dearborn Brothers, and indorsed by them to the plaintiff. Writ dated December 10, 1875.

The declaration alleged in substance that the defendant, knowing the plaintiff to be the owner of the check and fraudulently contriving to defraud and cheat the plaintiff, first stopped payment upon the check and subsequently, upon the pretence that he wished to examine it, obtained possession of the check and refused to give it back to the plaintiff; and that the stopping payment on the check and each and all the subsequent acts of the defendant, including the conversion of the check, constituted a gross fraud upon the plaintiff, such as a discharge in bankruptcy would not affect, and was a breach of trust and an embezzlement of the plaintiff's property. The answer contained a general denial, and set up a discharge in bankruptcy.

At the trial in the Superior Court, before *Dewey*, J., the plaintiff introduced evidence tending to prove that the defendant, being indebted to the firm of Dearborn Brothers, gave the check to J. H. Dearborn, one of the firm, on October 28, 1873, on account of such debt; that the check was, on the same day, for a valuable consideration, indorsed and delivered to the plaintiff by Dearborn Brothers; and that on the day it was payable it was presented to the bank for payment by the plaintiff and payment was refused, the defendant having notified the bank not to pay the same; that the plaintiff then sent his clerk to the defendant's place of business with the check to present it for payment; that the clerk, having the check with him, asked the defendant why payment of the check had been stopped, and

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the defendant said he wanted to see the check, and, the check being handed to him, took it and put it in his drawer and refused to return it, saying he would keep it; that the plaintiff, on the return of his clerk, went to the defendant's store and said to him that he came to ascertain why he had stopped the payment of the check and kept the check from the clerk, and the defendant said he thought he could take care of the check himself, refused to give it up, and has since retained and refused to deliver or pay the check to the plaintiff.

The defendant proved his discharge under the United States bankrupt act from all debts, claims and demands existing prior to March 20, 1874, which were or might have been proved against him in bankruptcy, except such as were exempted by the bankrupt act; and contended that the present action could not be maintained on the plaintiff's evidence.

The plaintiff contended that the debt or liability which he sought to enforce in this action was created by the fraud of the defendant, and, therefore, was not affected by his discharge in bankruptcy.

The judge, among other instructions given, instructed the jury, that if the defendant took the check and retained it, under a claim of right, honestly believing he had a right so to do, he was not liable in this action, though in law he had no right to retain it; but that if the defendant obtained possession of the check by fraud, knowing that he had no right to it, and retained possession of it intending to prevent and thereby preventing the plaintiff having possession of property belonging to him, then this action could be maintained.

The judge, at the plaintiff's request, also instructed the jury that if the defendant did any acts, in relation to suppressing and retaining the check, which were unlawful for him to do, thereafter no presumption existed that he was innocent of wrongful intent in so taking and retaining it; but, in that case, the burden was upon the defendant to prove, and that he must satisfy the jury, that he acted honestly and under a belief that he had a right so to take it and retain it.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. Thacher, for the defendant,

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P. H. Hutchinson, for the plaintiff.

SOULE, J. A discharge in bankruptcy bars all claim against the bankrupt on account of his wrongful conversion or withholding of goods or chattels, where the conduct of the bankrupt is free from fraud. U. S. Rev. Sts. §§ 5067, 5114, 5119. But if the debt is created by the fraud of the bankrupt, it is not affected by the discharge. U. S. Rev. Sts. § 5117. The declaration alleges that the defendant obtained possession of the check by the fraudulent representation that he wished to examine it, made with a fraudulent purpose to cheat and defraud the plaintiff, and that, having thus obtained the check, he kept it and converted it to his own use, with the same fraudulent purpose, knowing when he took it that it was rightfully the plaintiff's. The check was signed by George N. Noyes & Co. and indorsed by Dearborn Brothers. If the allegations were proved, the demand would be clearly within the class of debts excepted from the operation of the discharge. *Morse* v. *Hutchins*, 102 Mass. 439. The instruction on this branch of the case was correct.

The fraud of the defendant was an essential element in the case which the plaintiff must make out in order to prevail. It was not enough to prove that the defendant was wrongfully in possession of the check. If the proof went only thus far, it would establish a demand barred by the discharge in bankruptcy. The instruction of the learned judge who presided at the trial of the case, "that if the defendant did any acts, in relation to suppressing and retaining the check, which were unlawful for him to do, thereafter no presumption existed that he was innocent of wrongful intent in so taking and retaining it, but, in that case, the burden was upon the defendant to prove, and that he must satisfy the jury, that he acted honestly and under a belief that he had a right so to take it and retain it," leaves out of view the fact that fraud by the defendant is an integral part of the plaintiff's case, as to which the burden of proof is on him, and the principle of law that such burden is on him to the end. The defence which it was sought to establish was not by way of confession and avoidance, but was by negativing the existence of fraud, one element to be proved by the plaintiff. If the check was rightfully the plaintiff's, any act which the defendant might do in relation to suppressing or retaining it, which it was un-

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lawful for him to do, would be equally unlawful, that is to say, equally in violation of the rights of the plaintiff, whether the defendant had obtained the check openly and honestly, with a belief that he was entitled to it, or by fraud and with intent to cheat the plaintiff. This instruction, therefore, was erroneous, and the verdict cannot stand. *Exceptions sustained.*

JOHN J. KELLER *vs.* ROBERT WEBB & another.

Suffolk. March 25. — July 19, 1878. ENDICOTT & LORD, JJ., absent.

In an action on a written contract for the purchase of a certain number of "casks" of black lead at so much a pound, oral evidence of the size of casks agreed upon is admissible.

CONTRACT for breach of an agreement to purchase certain black lead.

At the trial in the Superior Court, before *Rockwell*, J., the following letter from the plaintiff to the defendants was in evidence:

"When we had the pleasure of your visit a short time since, you stated that you would report on your return to Boston, in regard to the contract for about 600 casks of Crown double hammer No. 1, Amalia Mine, German black lead, for next year. According to last quotations, we could import the lead at $1.70 gold per 100 lbs. in shipments of 100 casks per month (probably from the 1st April next), payable cash in 30 days after arrival of each lot."

The defendants' letter of acceptance was as follows: "Your esteemed favor of the 23d inst. is at hand and contents noted. We should like to make the contract for the 600 casks, Crown double hammer No. 1, Amalia Mine, German lead, at $1.70 gold per 100 pounds."

There was also evidence that the kind of lead in question was imported in casks weighing about 800 pounds each, unless especially ordered otherwise, and that it was imported in long and short casks of different weight.

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The defendants contended that, at the time of making the contract referred to in the plaintiff's letter, the parties bargained for lump lead, 600 pounds in the casks, and proposed to ask one of the defendants, who was a witness, the following question: "At the time of making the agreement in suit, was there any stipulation by parol between you and the plaintiff as to the weight of the casks referred to in the written agreement?"

The plaintiff objected to the question, on the ground that it was sought by parol evidence to vary, control and contradict the contract in writing; and the judge excluded the question.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

J. D. Thomson, for the defendants.

S. J. Thomas, for the plaintiff.

COLT, J. The intention of the parties to a contract is ascertained by applying its terms to the subject matter. Parol evidence is admissible for the purpose of removing any ambiguity which arises in so applying a written contract. The admission of parol evidence for such purpose does not violate the rule which makes the written instrument the proper and only evidence of the agreement. If the previous negotiations make it manifest in what sense the terms of the contract are used, such negotiations may be resorted to as furnishing the best definition to be applied in ascertaining the intention of the parties. The sense in which the parties understood and used the terms of the contract is thus best ascertained. *Stoops* v. *Smith*, 100 Mass. 63. *Miller* v. *Stevens*, 100 Mass. 518. *Swett* v. *Shumway*, 102 Mass. 365.

In the case at bar, the black lead contracted for was to be paid for by the pound, and the written agreement of the defendants was to take 600 casks in shipments of 100 casks per month. The contract is silent as to the weight of the casks, and therefore the number of pounds which the defendants were obliged to take can only be ascertained by finding what the parties understood by the term "casks." The damages which the plaintiff is entitled to recover can only be computed by knowing the weight of the casks named in the contract. It is open to both parties to show by all the circumstances, including what the parties may have said before, or at the time of the contract, or by their admissions afterwards, what was meant by that term. This the

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defendants tried to do in the evidence offered by them and excluded by the judge; and, for this exclusion of evidence, the entry must be *Exceptions sustained.*

NORAH KENNEDY, administratrix, *vs.* STANDARD SUGAR REFINERY.

Suffolk. Nov. 16, 1877. — July 24, 1878. COLT & AMES, JJ., absent.

If a person falls from a platform twenty feet to the ground, becomes unconscious on striking the ground, and remains so until his death, damages cannot, in an action against the person who was bound to keep the platform in repair, and through whose neglect in so doing the accident happened, be recovered for the mental or other suffering endured during the fall.

TORT for personal injuries occasioned to the plaintiff's intestate, Daniel Kennedy, by the negligence of the defendant. Answer, a general denial.

At the trial in this court, before *Soule*, J., it appeared that Kennedy was hired by a stevedore in the employ of the defendant, to discharge coal, and, on the day before the accident, had been engaged in wheeling coal; that on the morning of the accident, while walking across a platform, which had been constructed so that coal could be discharged from vessels alongside the defendant's premises into a large shed, and carrying one end of a plank to be used in discharging coal, the other end of which was carried by a man who preceded him, the flooring of a scuttle, which had been made in the platform for the purpose of filling the bins beneath, gave way, and Kennedy fell a distance of about twenty feet to the ground; that, in falling, he exclaimed that the plank had broken; that, with this exception and a single low moan, he made no sound that was heard before he was taken up unconscious; and that he died on the following day, having lived about thirty-six hours after the accident. It did not appear that any bones were broken, but the opinion of the attending physician, who made him several visits, was that death was caused by a concussion of the spinal column. The evidence was conflicting as to whether Kennedy regained consciousness before his death.

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The defendant requested the judge to instruct the jury as follows: "If Kennedy was unconscious from the time of the accident to his death, the right of action did not survive, and the action cannot be maintained; but if the right of action survived, and he was unconscious from the time of the accident, only nominal damages can be recovered."

The judge refused so to rule, and, on the question of damages, instructed the jury as follows: "If the intestate lived after the accident, the right of action survived, even if he was unconscious from the time he struck the ground, but the damages will be limited to compensation for his mental sufferings and his physical suffering and loss. No damages can be recovered on account of his death. If the jury find that he was unconscious, then there was no suffering during such time as he was unconscious; but, in estimating the amount of damage, the jury may include compensation for mental or other suffering endured by the intestate from the time he fell until he struck the ground."

The jury returned a verdict for the plaintiff for $1250; and the defendant alleged exceptions.

R. M. Morse, Jr., for the defendant.

J. A. Maxwell, for the plaintiff.

MORTON, J. The plaintiff's intestate while at work upon a platform, by reason of a defect, for which the defendant is liable, fell a distance of about twenty feet to the ground. The evidence tended to show that he became unconscious immediately upon striking the ground, though there was conflicting evidence as to whether he regained consciousness before his death which occurred about thirty-six hours after the accident.

The instruction that the cause of action survived was correct. Even if the intestate became instantly insensible and so remained until his death, so that nothing could be recovered for any physical or mental suffering, yet the plaintiff might be able to show substantial damages in the expenses and loss incurred before death, by reason of the accident. *Bancroft* v. *Boston & Worcester Railroad*, 11 Allen, 34. The defendant now concedes the correctness of this instruction, and excepts only to the last clause, which it contends allowed the jury to find substantial damages for the mental suffering of the intestate from the time he fell until he struck the ground. The only question we have to consider is the correctness of this last instruction.

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It may be true, as an abstract proposition of law, that if a man is precipitated from a height by the negligence of another, and is injured, he may recover, as one element of his damages, for any mental suffering he may prove he endured during his fall. But we think that the instruction, applied to the facts of this case, had a tendency to mislead the jury to the prejudice of the defendant.

The plaintiff was entitled to recover only such damages as she proved were sustained by her intestate. The burden of proof was upon her to show that the intestate endured mental suffering during the fall, before the jury could allow any damages on that account. But the evidence in the case showed that the intestate became unconscious upon striking the ground. The fall occupied but an instant of time. He could not furnish and did not furnish any proof as to his mental condition during the fall. Whether he suffered any mental terror or distress is purely a matter of conjecture. The plaintiff therefore could recover nothing on this account. But the instruction given naturally led the jury to suppose that they might give the plaintiff substantial damages for the mental suffering of the intestate during the fall.

The jury returned a verdict for the plaintiff for a considerable sum. It may be that the verdict was based upon a finding that the intestate regained his consciousness before his death, and thus was entitled to substantial damages for his bodily and mental sufferings. But it may be that the jury found that he remained unconscious until his death, and that they awarded substantial damages for his mental suffering during the fall and before he became unconscious.

We are therefore of opinion that there should be a new trial.

Exceptions sustained.

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ELIZABETH MORAN, administratrix, *vs.* RICHARD HOLLINGS & another.

ELIZABETH MORAN *vs.* SAME.

Suffolk. March 20. — July 24, 1878. AMES & MORTON, JJ., absent.

An action for personal injuries caused by falling a distance of forty feet, and resulting in instant death on reaching the ground, cannot be maintained.

TWO ACTIONS OF TORT. The first was brought by the plaintiff as administratrix, for personal injuries occasioned to her intestate, John J. Carey, a boy sixteen years old, while in the employ of the defendants. The second was brought by the plaintiff as surviving parent of the deceased, for the loss of services arising from the same accident.

At the trial in the Superior Court, before *Dewey*, J., the plaintiff offered to show that, by reason of the negligence of the defendants, Carey fell a distance of forty feet, through four hatchways, and was instantly killed by striking on the lower floor of the defendants' building. The plaintiff also contended that Carey, in falling through the hatchways, might have struck against some obstacle, thereby receiving injuries from which he might have recovered, but no evidence was offered on this point, except as above stated. Upon the foregoing offers of proof, the judge ruled that the actions could not be maintained; and directed the jury to return a verdict for the defendants in each case. The plaintiff alleged exceptions.

A. R. Brown, for the plaintiff.

N. Morse, for the defendants.

BY THE COURT. The plaintiff cannot, either as her son's administratrix or as his surviving parent, maintain an action for his death, and there was no proof of injuries during his lifetime for which damages could be recovered. *Carey* v. *Berkshire Railroad*, 1 Cush. 475. *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108. *Kennedy* v. *Standard Sugar Refinery*, *ante*, 90.

Exceptions overruled.

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DANIEL CURRY *vs.* EDWARD F. PORTER.

Suffolk. March 5. — July 24, 1878. COLT & SOULE, JJ., absent.

A general exception to the entire charge of a judge to the jury is irregular, and cannot be sustained.

CONTRACT upon a check. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, which, after stating the evidence in the case and setting forth the entire charge to the jury, concluded as follows: "Plaintiff's counsel excepted to the charge, and prays that his exceptions may be allowed."

W. Gaston & C. E. Hubbard, (*I. W. Richardson* with them,) for the plaintiff.

E. D. Sohier & L. W. Howes, for the defendant.

MORTON, J. This case presents an important question of practice. The only exception taken at the trial was an exception to the charge of the presiding justice, which is set out in full in the bill of exceptions. The plaintiff made no requests for instructions, and did not allege exceptions to any specified rulings or directions of the court upon matters of law, but, at the close of the trial, simply "excepted to the charge."

The statute provides that, in all cases, "a party aggrieved by an opinion, ruling, direction or judgment of the court in matters of law, may allege exceptions thereto." Gen. Sts. *c.* 115, § 7. This provision imports, and such has been its uniform practical construction, that it is the duty of a party to allege his exception specifically to any ruling or direction in matters of law by which he feels aggrieved, so as to call the attention of the court and of the adverse party to the point excepted to. To allege an exception to the whole charge is an abuse and evasion of the statute, and leads to great inconvenience and danger of injustice. The true rule cannot be better stated than in the words of Mr. Justice Story, in *Carver* v. *Jackson*, 4 Pet. 1, 81, and adopted by Chief Justice Marshall, in *Ex parte Crane*, 5 Pet. 190, 198: "If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement; and, by being made known at the moment, would often enable the court to correct an erroneous expression, or to explain or

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qualify it, in such a manner as to make it wholly unexceptionable, or perfectly distinct."

There are several cases in this court in which the whole charge has been set out in the bill of exceptions; but this course has been uniformly condemned. *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1. *Commonwealth* v. *Costley*, 118 Mass. 1. In those cases there were specific requests for instructions and exceptions, which were entertained and considered by the court. But in the case at bar, as appears by the bill of exceptions, there was only a bald exception "to the charge."

For the reasons above stated, we are of opinion that this exception was irregularly and improperly taken. See *Harriman* v. *Sanger*, 67 Maine, 442, and cases cited.

Exceptions overruled.

MARGARET KNOTT *vs.* HORACE B. SARGENT.

Suffolk. March 8. — July 24, 1878. COLT & SOULE, JJ., absent.

In an action for malicious prosecution, it appeared that the prosecution was begun by complaint to a police court, upon which the accused was arrested and tried; and that the judge found that there was probable cause to believe the accused guilty of the offence charged, and ordered him to recognize to appear and answer at the next term of the Superior Court; that a recognizance was given, containing the condition that if the accused should personally appear before the Superior Court at the term mentioned, and at any subsequent term "to which the same may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence or order of the Superior Court thereon; and shall abide such final sentence, decree or order," &c., the recognizance should be void; that the records of the Superior Court only showed that, at the term of that court to which the recognizance was returned, the grand jury returned no bill in the case of the accused. Parol evidence was admitted, against the plaintiff's objection, to the effect that the case was continued by the grand jury, on account of the absence of a material witness, and that at the next term of the court the same action was had by the grand jury, for the same reason; and had not for more than a year afterwards been acted upon. *Held*, that the parol evidence was admissible; and that the prosecution had not been so far terminated that the action could be maintained.

TORT for malicious prosecution. Writ dated March 19, 1875. The declaration alleged that the defendant, maliciously and without probable cause therefor, caused a complaint to be sworn out

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before a justice of the Police Court of the city of Salem on May 18, 1874, wherein the plaintiff was charged with the crime of larceny of sundry articles alleged to be the property of the defendant, and of the value of over $500; that thereupon the justice issued his warrant for the arrest of the plaintiff, which was duly served, and the plaintiff was brought into court and ordered to recognize with surety in $700 for her appearance, and to further answer to the complaint at the Superior Court to be held at Lawrence, in the county of Essex, on the first Monday of October then next ensuing, with which order the plaintiff complied; that, at said term of the Superior Court, the complaint was heard by the grand jury, who returned no bill against the plaintiff in the premises, but she was discharged; that this was the determination of the prosecution; and that the plaintiff had sustained damage thereby. Answer, a general denial; and that the prosecution and proceedings mentioned in the declaration were not determined, as alleged.

The records of the Police Court of Salem showed a complaint, signed and sworn to by George W. Luscomb, in behalf of the Commonwealth, against the plaintiff for the crime of larceny as alleged in the declaration; the arrest of the plaintiff under a warrant issued upon the complaint; the judgment of the court that there was probable cause to believe the plaintiff guilty of the offence charged, and an order that she recognize in the sum of $700 "to appear and answer further to this complaint at the Superior Court to be held at Lawrence on the first Monday of October next."

The condition of the recognizance was as follows: "Now therefore, if the said Margaret Knott, according to the above mentioned order of the said Police Court, shall personally appear before the Superior Court to be holden as aforesaid, and then and there shall do and receive that which by the said Superior Court shall be then and there enjoined upon her; and also if she shall in like manner personally appear at any subsequent term of said Superior Court to which the same may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence or order of the said Superior Court thereon, and shall abide such final sentence, decree or order of the said Superior Court, and not depart without

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leave, and in the mean time shall keep the peace and be of good behavior, then the above written recognizance to be void and of none effect; otherwise, to abide in full force, power and virtue."

The records of the Superior Court showed only that, at the term held on the first Monday of October, 1874, "the grand jury return 'no bill' in the following cases:" Then followed the names of several cases, among them that of Margaret Knott.

The district attorney for the county of Essex testified, against the plaintiff's objection, that the case was heard before the grand jury at October term 1874, and continued or postponed by them, on account of the absence of a material witness, until the next session, on the fourth Monday in January following; that at the next term there were other witnesses who could not be found, and the case was again continued by the grand jury, and had not, up to April, 1876, been acted upon by any grand jury.

The case above stated was submitted to the full court as a statement of facts, with the agreement that if the court should be of opinion that there had been such a termination of the proceedings as alleged in the declaration, the case should stand for trial; otherwise, the plaintiff should become nonsuit.

C. J. Brooks, for the plaintiff, cited *Gilbert* v. *Emmons*, 42 Ill. 143; *Stancliff* v. *Palmeter*, 18 Ind. 321; *Moulton* v. *Beecher*, 8 Hun, 100.

G. A. Somerby & F. F. Heard, (*H. B. Sargent, Jr.*, with them,) for the defendant.

MORTON, J. It is a familiar rule that, in an action for malicious prosecution, the plaintiff must prove that the prosecution which he alleges to be malicious has been terminated. "The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." Bul. N. P. 12.

If the prosecution alleged to be malicious was by complaint to a magistrate, upon which the plaintiff was bound over to appear at the Superior Court, he must show that he has been discharged by the order of that court. Until such discharge, the prosecution is not at an end, but he and his sureties remain liable upon his recognizance.

The *dictum* of Mr. Justice Buller in *Morgan* v. *Hughes*, 2 T. R. 225, that if the accused "was discharged by the grand jury's

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not finding the bill, that would have shown a legal end to the prosecution," does not necessarily imply that the mere fact of the grand jury's not finding a bill at the term to which the accused is bound over would be an end of the prosecution. It rather implies that the prosecution is not ended unless he is discharged by reason of the grand jury's finding no bill. See *Thomas* v. *De Graffenreid*, 2 Nott & M'Cord, 143. Under our practice, it cannot be held that the prosecution is at an end, until the accused has been discharged by an order of the court.

In the case at bar, as is to be assumed for the purposes of the question before us, the defendant caused to be instituted before the Police Court of Salem a complaint against the plaintiff, charging her with the crime of larceny. She was adjudged to be probably guilty, and ordered to recognize, with surety, to answer further to the complaint at the October term 1874 of the Superior Court. She thereupon entered into a recognizance to appear at the October term of the Superior Court, and at any subsequent term or terms until the final sentence, decree or order of the Superior Court, and to abide such final sentence, decree or order. To prove that this prosecution was at an end, the plaintiff introduced the records of the Superior Court, by which it appears that, at the said October term, "the grand jury return 'no bill' in the following cases," the list of cases forming part of the return including that of the plaintiff. But the record does not show that the plaintiff was thereupon discharged by the court. The mere return of "no bill" by the grand jury did not operate as a legal discharge of the accused, and did not necessarily import that the same or a subsequent grand jury might not find a bill upon the same complaint. The testimony of the district attorney, therefore, that the case was continued before the grand jury by reason of the absence of a witness, did not contradict the record, and was competent.

The evidence in the case shows that, at the time when the plaintiff commenced this suit, the prosecution alleged to be malicious had not been terminated; and it follows that she cannot maintain the action.

According to the terms of the agreed facts, therefore, the entry must be *Plaintiff nonsuit.*

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CHARLES H. WORTHEN *vs.* GRAND TRUNK RAILWAY COMPANY.

Suffolk. March 14. — July 24, 1878. COLT & LORD, JJ., absent.

In an action by a passenger against a railroad corporation for personal injuries received while in a train on the defendant's road, it appeared that the injury was caused by the train running into another train at a station. The plaintiff testified that the train was running at an unusual rate of speed, and that for several miles before it reached the station it was racing with a train on a parallel road. The defendant, in order to show that the train was running at the usual speed, asked a witness whether the train was running at the usual speed as it approached the station. The judge refused to admit this evidence, unless the defendant also undertook to show that such usual speed was a safe and proper rate of speed, such as was usual upon well-conducted railroads; and the defendant excepted. *Held*, that this evidence should have been admitted.

A passenger in the car of a railroad corporation, on approaching the station to which he was going, left his seat and stood beside it, with his hand on the knob or on the edge of the door of the car, which had been open for some time. While he was so standing, the car came into collision with another car, and the passenger was thrown out on the platform and injured. *Held*, in an action by him against the railroad corporation, that the question, whether he was in the exercise of reasonable care, was for the jury.

TORT against a common carrier, for personal injuries occasioned to a passenger, by the alleged negligence of the defendant. Answer: 1. A general denial. 2. That the plaintiff was not in the exercise of due care. Trial in this court, before *Lord*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was injured by the collision of an express train on the defendant's road, in which he was riding, with an accommodation train standing on the same track, at the depot at Detroit Junction in Michigan, at which depot the train on which he was riding was to stop, and he was to change cars.

The plaintiff testified that the train, on which he was, was running at an unusual speed, much faster than he had been accustomed to ride on the defendant's road; that it did not stop at a crossing of the Bay City road, three miles distant from Detroit Junction; that from the Milwaukee Junction, five miles distant from the Detroit Junction, the train was racing with a train on the Michigan Southern road, which was parallel with the defendant's road, and was in sight all the way; that, as they approached

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the Detroit Junction, and within one or two miles of it, the conductor took up the plaintiff's ticket and said to him, "You will change cars at the next stopping place;" that, the front door of the car being open, he went out upon the front platform of the car and looked to see how near they were to the junction, and looked at the trains racing, returned into the car and got his baggage ready, and placed it on the front seat, on which he had been sitting, ready to be taken up when the train should stop; that he stood beside his seat, within a step or so of the door, with his hand holding either on the knob of the door or on the edge of the door, which still remained open; that the cars, instead of stopping at the point where they ought to have stopped, went forward with great velocity and came into collision with a train standing on the track; that the shock of the collision was so great as to throw him out on the platform, and, holding on to the door, he was thrown around so as to bring his back next to the window, at the same time that the platform of the smoking-car ahead of him was driven over the platform of the car on which he was thrown, and, the railings of the cars being forced against him, forced him through the window and caused the injuries complained of.

The engine-driver testified that the Smith patent steam-vacuum brake, which was used on the train, failed to work so as to stop the train before it struck the other train; that the train had been examined at Port Huron, sixty miles distant; that this steam-vacuum brake was an approved brake, and worked at every other station, stopping the train promptly; that at the Bay City road crossing the cars came to a full stop; that when the patent air-brake did not work, he sounded the whistle for down brakes, which were applied, and the engine reversed; that the train was not racing with the train on the Michigan Southern road; and that the express train usually followed the accommodation train, which it struck, into the station at an interval of ten minutes after the accommodation train got there, to give it time to change passengers and baggage, and go forward.

There was evidence tending to show, on the part of the plaintiff, that the train was running at an unusual speed when it came to the station; that the rules of the road in regard to signals had not been followed; and that the rubber hose of the steam-vacuum

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brake was not in order; all of which evidence, which was controverted by the defendant, was submitted to the jury on the question of negligence.

The defendant then proposed to ask the conductor whether the train was running at the usual speed at this point, as it approached Detroit Junction, in order to show that it was running at the usual speed, the witness having already testified what that speed was. The plaintiff objected to his testifying whether it was the usual speed, on the ground that, for aught that appeared, the defendant usually ran its train at an improper speed. The judge ruled that the defendant could not show that it was running the train at the usual speed, unless it also undertook to show that such usual speed was a safe and proper rate of speed, such as was usual upon well-conducted railroads; and the defendant excepted.

Among other instructions, to which no exceptions were taken, the judge instructed the jury that if the plaintiff, at the time of the injury, was not exercising reasonable care and caution, and the want of such reasonable care and caution caused, or contributed to cause, the injury, he was not entitled to recover; and that, as a matter of law, it would not be reasonable care and caution to stand upon the platform of a running car.

The defendant further requested the judge to instruct the jury that it is not, as a matter of law, reasonable care and caution to stand in the open door of a moving car, or to stand so near an open doorway of a moving car as to be thrown upon the platform. This instruction the judge declined to give; but instructed the jury that if the plaintiff was standing inside of the car before the open doorway, it was a question for them to say whether a man in that position was in the exercise of reasonable and proper care; and that they must be reasonably satisfied, taking all the evidence together, that he was at the time within the car, and was in the exercise of that reasonable care which his situation, at that particular time, and those circumstances required of him.

The jury returned a verdict for the plaintiff for $18,335; and the defendant alleged exceptions.

J. Rand (of Maine) *& R. D. Smith*, for the defendant.

E. L. Barney, for the plaintiff.

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MORTON, J. The plaintiff was injured by a collision at the depot at Detroit Junction. He testified that the train in which he was riding was running at an unusual rate of speed, and that for five miles before it reached Detroit Junction it was "racing with a train on the Michigan Southern road, which was parallel with the defendant's road and was in sight all the way." We are of opinion that the question proposed by the defendant to its conductor, whether the train was running at the usual speed at this point, should not have been excluded. It is true that the fact that the defendant was running at the usual rate of speed would not be a defence, unless it appeared that such rate was a safe and proper rate of speed; but the testimony excluded would contradict the plaintiff's testimony, and would tend strongly to show that the train was not racing with the train on the parallel road. It thus bore upon a question which would undoubtedly be influential with the jury in deciding the issue of the defendant's negligence.

We see no ground of objection to the other rulings at the trial. The question, whether the plaintiff was using due care, was a question for the jury, and was submitted to them with instructions which were sufficiently favorable to the defendant.

Exceptions sustained.

CHARLES H. STUART & others *vs.* CITY OF CAMBRIDGE.

Suffolk. March 18. — July 24, 1878. COLT & AMES, JJ., absent.

A. made an agreement in writing with a city, for a round sum, to provide all materials and perform all labor required in the erection of a public building upon a certain parcel of land, according to plans, drawings and accompanying mason's specifications, prepared by a certain architect, and such other drawings and detail explanations, as might be considered necessary for the progress and completion of the building, according to the true intent and meaning thereof. The agreement also provided that, in case any particulars should be deficient or not clearly shown by the plans or expressed in the specifications, A. should carry out the general design, as directed by a certain committee and the architect, in as thorough a manner as if the same were shown and fully expressed; that it should be lawful for the committee or architect to direct in writing any additions to or deviations from the plans and specifications, and in such case such sums of money should be added to, or deducted from, the agreed price, as the parties to the agreement should judge the

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increase or diminution to be worth; that no alterations or additions should be paid for unless so directed in writing. The specifications provided that A. should remove the earth from the area of the lot to be covered by the building, to the requisite length, breadth and depth for the basement, walls, foundations, &c; that the exterior basement foundation walls should be constructed of large, flat, blue stone, to be faced upon both sides, and laid solid in and pointed on both sides with mortar; that the earth beneath the walls should be thoroughly tamped and puddled and the bottom course firmly bedded upon it; that all the basement walls should commence fourteen inches at least below the basement floor, and as much deeper as necessary, to guarantee a firm and solid foundation, the walls to be of the thickness and construction indicated by the drawings; that A. should do any and all other masonry necessary to fully finish and complete all parts of the building, according to the true intent and meaning of the plans, drawings and specifications, whether particularly therein described or not. The plans showed a section of the foundation walls fourteen inches below the basement floor and no more, and did not indicate any piles, nor were any mentioned in the specifications. In excavating for the foundations, the soil was found to be of such a character as to require, in the opinion of the architect, piles to be driven in order to secure a firm foundation for a part of the walls. The architect accordingly furnished piling plans, directed A. to do the work, and orally promised him that he should be paid for it. A. drove the piles, cut them off, placed coping stones on them, and rubble stones on the coping stones up to the line of the foundation walls, as shown in the plans. *Held*, in an action for the work and materials so done and furnished, that parol evidence that the plaintiff made his estimate for the cost of the work based on the plan showing a section which required a depth of only fourteen inches, and that other persons in the same business were accustomed to make estimates in the same manner, was incompetent; that the defendant was not bound by the oral promise of the architect that the work should be paid for; and that the action could not be maintained.

CONTRACT on an account annexed to recover $591.84, for labor performed and materials furnished. At the trial in the Superior Court, before *Wilkinson*, J., without a jury, it appeared that on November 20, 1874, the plaintiffs, as the parties of the first part, and the defendant, acting by its committee on public property, as the party of the second part, entered into an agreement, under seal, the material parts of which were as follows:

"The said parties of the first part do hereby agree for themselves, their heirs and assigns, to provide all materials and perform all labor required in the erection and completion of the masonry of a building, for the party of the second part, to be located upon its estate situated on the corner of Sacramento and Oxford streets, in and for said city, according to plans, drawings, and the accompanying mason's specifications, prepared by J. H. Littlefield, architect, bearing even date herewith, and signed by the parties hereto; and such other drawings and detail explana-

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tions, as may be considered necessary for the progress and completion of the building, according to the true intent and meaning thereof.

"And in case any particulars shall be deficient or not clearly shown by said plans or expressed in said specifications, the said parties of the first part shall carry out the general design as directed by said committee and architect in as thorough a manner as if the same were shown and fully expressed.

"And in case any work or materials done or provided by the said parties of the first part shall be unsatisfactory to the said committee or architect, then the said parties of the first part shall, on being notified thereof by said architect, immediately remove such unsatisfactory work or materials and supply the place thereof with other work or materials which shall be satisfactory to said committee and architect.

"And it shall be lawful for the said committee or architect at all times to direct in writing any additions to or deviations from the plans and specifications aforesaid, without in any other respect or particular varying this agreement or impairing the force thereof; and in case of any such deviations or additions, so directed in writing, such further time shall be allowed for the completion of the said work as the said architect shall decide to be reasonable, and such sums of money shall be added to, or deducted from, the amount of the consideration hereinafter agreed to be paid, as the said parties, committee and architect shall judge the increase or diminution in the amount of work and materials thereby occasioned to be fairly worth.

"And it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing.

"In consideration of the foregoing, the said party of the second part hereby agrees to pay to the said parties of the first part" "the sum of ten thousand four hundred and ninety-five dollars, in separate payments as follows:" [Then followed a provision in respect to the mode of payment.]

The plans did not show any piles, and the specifications, referred to in the agreement, did not mention any; but the specifications provided, under the heading "Excavations," that the earth should be removed "from the area of the lot to be covered by the building and other works to the requisite length, breadth

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and depth, for the basement, walls, foundations, piers," &c. Under the heading "Foundations," were the following provisions:

"The exterior basement foundation walls, shown to be constructed of stone by the plans, and all other exterior foundations beneath steps, door sills, platforms, &c., are to be constructed of the best quality of large, sound, flat, blue stone, laid with the broadest sides level. The work is to be well bonded and tied together, with at least every fourth stone the full thickness of the wall. All the basement and trench walls are to be faced upon both sides, and laid straight and true to a line, the basement side with a plumb, true fall, and the exterior with a battering fairly straightened face. The work is to be laid close jointed, thoroughly pinned up, and chinked with suitable stone quoins upon both sides, and filled solid with stone clear through.

"The work will be laid solid in, and pointed on both sides with mortar composed of one cask of best Newark cement to one of best fresh Rockland lime, mixed with a proper proportion of coarse, sharp-grit sand. The mortar for the trench walls, below the basement floor, will be three fourths cement to one of lime.

"The earth beneath all the walls is to be thoroughly tamped and puddled, and the bottom course of stone firmly bedded upon it. The bed or levelling course will be laid broader than the wall above it, as indicated by the sectional drawings.

"All the basement walls will commence fourteen inches at least below the basement floor, and as much deeper as necessary to guarantee a firm and solid foundation. The walls will all be of the thickness and construction indicated by the drawings, laid and completed in the most thorough and workmanlike manner."

The specifications further provided that the plaintiffs should "do any and all other masonry and jobbing in the masonry line, necessary to fully finish and complete all parts of the building according to the true intent and meaning of the plans, drawings and the mason's specifications, whether particularly herein described or not."

The work and materials in question consisted of piles furnished and driven by the plaintiffs; in excavating to an extra depth in order to drive the piles, and in cutting them off; of coping stones, furnished to lay on the piles, with the labor of lay-

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ing the same; and of rubble stones laid on the coping stones up to the line of the bottom of the foundation as shown on the plans from which the plaintiffs made their estimate, furnished for that purpose by the architect.

The defendant contended that the work and materials sued for in this action were furnished under the above agreement, for which the plaintiffs had been paid, and were within its terms, while the plaintiffs contended that the work and materials were extras not included in the contract, for which they were entitled to recover additional compensation.

The plaintiffs offered to prove that neither the plans nor specifications required any piles to be furnished or driven; that when they estimated and made the contract, they were furnished with a plan by the architect, showing a section of the foundation which they were to build, which section was figured, and required them to build the same fourteen inches below the bottom of the cellar, and no more, and that their estimate, bid and contract were made with reference to such plan and specifications; that on excavating for said foundation, as required by the plans and specifications, the soil was found to be of such a character on a part of the rear of the site of the proposed building as to make it necessary, in the opinion of the architect, to drive piles in order to secure a safe foundation for that part of the building; that thereupon the architect staked off the distance for which he wished piles to be driven, furnished the plaintiffs with piling plans, and directed them to do the work in question; and that the plaintiffs thereupon told the architect that if the piles were driven, and the work done by them, the same was not part of the contract, but would be extra work for which they would be entitled to additional compensation, and the architect told them to go ahead and do the work as he directed, and they would be paid for it. The plaintiffs also offered to prove that they then did the work in question by special direction of the defendant's architect, in accordance with the piling plans furnished them by him; that the prices charged for the same were just and reasonable; and that the architect was the defendant's agent, and authorized to bind the defendant by his acts and directions in the erection of the building.

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The plaintiffs also offered to prove, by a large number of persons engaged in the same business as themselves, and accustomed to estimate and bid for similar contracts, as experts, that the custom, rule or practice was universal, where plans were furnished, from which to make estimates, showing sections of the walls, to estimate according to the section as shown, and to contract with reference thereto, and that, if afterward the walls were changed by increasing their height or depth, such change was not included in the contract, and that additional compensation was due therefor.

The judge refused to admit any evidence; and ruled that, by the contract and specifications, the plaintiffs were bound to insure a safe foundation for the proposed building; that the defendant might require them to go to any depth necessary for that purpose; that, if it was necessary to drive piles to secure such a result, then the plaintiffs were bound to drive piles as part of their contract; that they were not entitled to recover any extra compensation therefor; and found for the defendant. The plaintiffs alleged exceptions.

I. T. Drew, for the plaintiffs. 1. The defendant selected the site for the building, and prepared the plans and specifications; from them the plaintiffs made their estimates of the expense. These plans and specifications nowhere call for or show the necessity of driving piles to get a safe, sound foundation. In the detailed specifications, so carefully drawn, piles are not mentioned. Contractors make estimates and bids from what appears and is required by the plans and specifications, and not from what does not appear by them, but which may afterwards become necessary. If the defendant did not sufficiently examine the site, that cannot affect the right to recover. The material and labor here sought to be recovered for were never contemplated in the original plans and specifications, and were not taken into account by the plaintiffs in their estimates. The architect, when the work was begun, found, what he had not discovered before, that the boggy character of the land required not only more excavating, but the driving of piles, and coping stones, &c. He then furnished the plaintiffs with additional plans for this work, and specially directed it to be done, telling them, in reply to their claim to that effect, that it was extra work, and

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would be paid for. He and the plaintiffs were experienced in this kind of business, and knew that this work was outside the original plans. If the plans called for excavations of fourteen inches, &c., to get a good foundation, this does not mean, by any fair interpretation, that the contractors shall drive twenty-five feet piles, and cover them with coping stones, fill with rubble, &c. The true construction of the contract, plans and specifications is that the plaintiffs are to excavate fourteen inches, more or less, as the case may require, but no pile-driving, coping or rubble stone is provided for or contemplated by any of the terms used.

2. If there is any doubt or ambiguity in the papers, or in their construction, as applied to the work in question, then the testimony offered by the plaintiffs should have been received.

3. The plaintiffs further offered to prove that the architect was the agent of the defendant, and authorized to bind the city by his acts and directions, and, with this proof admitted, the plaintiffs are clearly entitled to recover for the extra work. The contract expressly provides that the architect may make additions and deviations, and that such sums of money shall be added to, or deducted from, the consideration therein agreed to be paid, as the architect shall judge the increase or diminution in the amount of work and materials thereby occasioned to be fairly worth.

J. W. Hammond, for the defendant.

MORTON, J. By their contract with the city of Cambridge, the plaintiffs agreed "to provide all materials and perform all labor required in the erection and completion of the masonry of a building for the party of the second part, to be located upon its estate situated on the corner of Sacramento and Oxford streets, in and for said city, according to plans, drawings and the accompanying mason's specifications, prepared by J. H. Littlefield, architect, bearing even date herewith, and signed by the parties hereto; and such other drawings and detail explanations as may be considered necessary for the progress and completion of the building, according to the true intent and meaning thereof." Referring to the mason's specifications, we find the provision that "all the basement walls will commence fourteen inches at least below the basement floor, and as much deeper as

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necessary to guarantee a firm and solid foundation. The walls will all be of the thickness and construction indicated by the drawings, laid and completed in the most thorough and workmanlike manner."

Under their contract, the plaintiffs were required to dig to any depth necessary to secure a solid foundation. They were to make excavations "to the requisite length, breadth and depth for the basement, walls, foundations, piers," &c., and generally to do all the masonry "necessary to fully finish and complete all parts of the building according to the true intent and meaning of the plans, drawings and the mason's specifications, whether particularly herein described or not."

By the fair construction of this contract, the plaintiffs agreed to do all the work necessary to secure a solid foundation. They took the risk of its being necessary to drive piles in order to secure such foundation. The ruling of the Superior Court as to the construction of the contract was therefore correct.

The evidence offered by the plaintiffs, that they made their estimate according to a plan made by the defendant's architect, showing a section of the wall which required only a depth of fourteen inches, and did not require any piles, and that it was customary for other persons engaged in the same business to make estimates in similar cases in the same manner, was incompetent, because it tended to control and vary the written contract.

The plaintiffs also offered to show that they drove the piles and did the work for which this suit was brought, under the direction of the defendant's architect, who was the agent of the defendant; that they contended that the work was not included in their contract, and he told them "to go ahead and do the work as he directed, and they would be paid for it."

We are of opinion that this evidence was rightly excluded. The written contract carefully provides that any additions to or deviations from the plans and specifications shall be directed in writing by the committee or architect, and that "it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing." No evidence was offered of any waiver of this provision by the defendant, or of any authority in the architect to waive it. This clause was intended to protect the

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defendant against claims for extra work under alleged oral directions or contracts. If the evidence offered can be construed to show an oral promise by the architect, founded upon a sufficient consideration, to pay for the work sued for as extra work, it was made without authority, and is not binding upon the defendant.

Exceptions overruled.

MASSASOIT STEAM MILLS COMPANY *vs.* WESTERN ASSURANCE COMPANY.

Suffolk. March 6. — July 29, 1878. COLT & SOULE, JJ., absent.

A. made an application for insurance against fire to B., an insurance agent, who had authority to issue policies in the R. Company and to bind the W. Company. B. decided to place the risk in the R. Company and wrote a policy, which provided that the insurance might be terminated at any time at the company's option, on giving notice thereof. The R. Company refused to take the risk, but no notice thereof was given to the plaintiff, and B. immediately, without the plaintiff's knowledge, made a memorandum placing the risk in the W. Company; and a loss afterwards occurred on the same day. A. knew that the policy was written in the R. Company before the fire. *Held*, that the policy in the R. Company was in force at the time of the fire; that B. had no authority to rescind the contract without the consent of the parties; and that the W. Company was not liable.

CONTRACT. The first count was upon a policy of insurance against fire, alleged to have been made on November 2, 1875, by the defendant to the plaintiff. The second count was upon an agreement to insure and to deliver a policy of insurance. Writ dated September 18, 1876. At the trial in the Superior Court, before *Wilkinson*, J., the following facts appeared:

The plaintiff's property, described in the policy, was partially destroyed by a fire which broke out between 11 and 12 o'clock on the night of November 2, 1875. On or before November 1, 1875, Holden P. Durfee, the treasurer of the plaintiff corporation, duly authorized to keep its property insured, directed Benjamin L. Wood, an insurance agent, to effect insurance in place of certain policies then expiring. Wood, in the afternoon of Monday, November 1, 1875, asked Joseph W. Hinckley, one of the firm of Jackson and Hinckley of Taunton, agents of the Revere

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Insurance Company, the Western Assurance Company, and of other companies, whether he could place $2500 on the Massasoit Steam Mills. Hinckley, after consulting with Jackson, reported to Wood that they would take the $2500, but did not tell him in what company. Jackson and Hinckley had authority to write policies in the Revere Company, but their authority in the defendant company was limited to binding the company, the policies being written by one Carpenter, the general agent in Boston. Jackson and Hinckley decided to write the $2500 in the Revere, and a policy was written by them on November 1 or 2 in the Revere, and the placing of the risk was reported to the main office of the Revere in Boston, on November 1. On Tuesday evening, November 2, about 6 o'clock, Jackson took a letter from the post-office in Taunton, from the president of the Revere Insurance Company, declining the risk. Jackson read it, took it to his office, laid it upon his desk, left his office and returned there the same evening about half-past seven or eight o'clock. The Revere policy at that time was in his office, not having been delivered. He then consulted with Hinckley, and they decided to place the risk at once in the defendant company, and Hinckley made a memorandum to the following effect: "Nov. 2, 1875, Massasoit Steam Mills, $2500 in Western Assurance." On the morning of November 3, about 8 o'clock, before going to Boston, Hinckley went to the house of their clerk and said that the Revere Company had declined the risk on the Massasoit Steam Mills, and instructed the clerk to report the risk to the Western Assurance Company, for Carpenter to write the policy. On this day both Jackson and Hinckley were absent from Taunton, and, at the time of the conversation with his clerk, Hinckley was ignorant of the fact that the fire had occurred the night previous, nor did Jackson know of the fire before leaving Taunton. On November 3, about 9 o'clock in the morning, Wood went into the office of Jackson and Hinckley and told the clerk that the Massasoit Steam Mills were burned, and that the mills wanted their policies, and asked if Jackson and Hinckley had written a policy for him. The clerk said they had in the Revere, but that the Revere had declined to take it, and that she had instructions to place it in the Western, and asked Wood what to do, because, as she said, she did not know whether she should insure a build-

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ing after it was burned; and told him she would wait until Hinckley returned. Wood asked her if she had the Revere policy in the office. She said she had, and Wood said, "I will take it." She replied, "Had you better take it before they" (Jackson and Hinckley) "come?" Wood answered, "Yes; I must have something to show for that insurance." The clerk thereupon gave it to him, and Wood took the Revere policy with others to Durfee and delivered it to him. On November 3, Jackson and Hinckley wrote to Carpenter, informing him of the burning of the Massasoit Steam Mills, and that they had placed the risk in the Western Assurance Company $2500 the evening before the fire. They did not make a report of the form of the written portion of the policy to the Western Assurance Company until the morning of November 4, and on the evening of November 4, or in the morning of November 5, they received from Carpenter a policy covering the property destroyed, dated November 2, for a period of one year, beginning at noon of November 2, being the policy declared on. On the morning of November 5, Jackson took the Western Assurance policy to Fall River and asked Durfee to exchange the Revere policy for it. Durfee was busy at that time, and told Jackson that he would meet him at the bank between 12 and 1 o'clock. Durfee was at the bank at the time appointed, but Jackson did not appear, and Durfee did not at any time exchange the Revere policy for the Western Assurance, concluding, as he expressed it in his testimony, that a bird in the hand was worth two in the bush. At the time Wood handed the Revere policy to Durfee, he did not state the circumstances under which he got possession of the policy.

Jackson received a telegram from Carpenter on November 6, asking him to return the policy in the Western. He retained the policy some four or five days and then returned it to Carpenter. On June 5, 1876, the plaintiff demanded the policy of Carpenter, but he did not then deliver it, nor has he since delivered it. Wood, on November 2, before the fire, was aware that Jackson and Hinckley had placed the risk in the Revere, but how he acquired the knowledge did not appear.

Wood and Jackson and Hinckley had considerable business dealings in the way of placing risks for each other, and it was not their custom to pay over the premiums at the time the risks

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were bound, but to account for the same in their monthly settlements.

Some time after the fire, Wood tendered to Jackson and Hinckley the amount of the premium for the $2500 covered by them, but they declined to receive it, either for the Revere Insurance Company or for the defendant, on account of the controversy that had arisen. The policy sued on had no provision making the liability of the company conditional upon the payment of the premium.

It further appeared that the Revere Insurance Company was the party really interested as plaintiff in this suit, in consequence of an arrangement made between said company and the Massasoit Steam Mills Company, and that the Massasoit Steam Mills Company claimed to hold only one of the two companies, the Western Assurance or the Revere.

The Revere policy contained the following clause: "The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium."

The plaintiff made proofs of loss, duly sworn to, to all the companies except the Western, on December 2, 1875, in each of which the name of the Revere Insurance Company was inserted and the name of the Western did not appear. Proof of loss was made to the defendant on June 14, 1876, similar to the ones made on December 2, 1875, except that the name of the Revere which was printed was stricken out, and the name of the Western interlined, the proofs to the Revere and the Western each being returned upon its receipt by them.

Upon these facts the defendant asked the judge to rule that the plaintiff could not maintain the action, but the judge refused so to rule, directed the jury to return a verdict for the plaintiff, and reported the case for the determination of this court. If, upon the facts, the action could be maintained, judgment was to be entered upon the verdict; otherwise, judgment for the defendant.

F. C. Welch & F. I. Amory, for the defendant.

M. F. Dickinson, Jr. & J. Fox, for the plaintiff, contended that Jackson and Hinckley had the right in good faith to alter their choice of the company in which insurance was to be effected,

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at any time before the delivery of the policy or notice to the plaintiff, and that having done so, and placed the risk in the defendant company, the latter was liable; and cited *Trippet* v. *Eyre*, 2 Ventr. 113; *Ward* v. *Day*, 4 B. & S. 337; *Damon* v. *Granby*, 2 Pick. 345; *Excelsior Ins. Co.* v. *Royal Ins. Co.* 55 N. Y. 343.

LORD, J. There can be no doubt that the policy of the Revere Insurance Company had attached before the fire. On or before November 1, 1875, application was made in behalf of the plaintiff for insurance. This application was made to Jackson and Hinckley, who were agents of the defendant company, and agents also of the Revere Insurance Company. These agents had authority to issue policies of the Revere Insurance Company. They had no authority to issue policies of the defendant company, though they had authority temporarily to bind it. On November 1, such agents informed the agent of the plaintiff that they had taken the insurance in the amount requested, to wit, in the sum of $2500. They did not tell him in what office they had taken it. This, however, is what they had done: They had decided to insure in the Revere Insurance Company. They had written the policy in that office under the plaintiff's application, and had notified the office to that effect. This was the precise condition of things from November 1 to the evening of November 2. If a loss had happened during that interval, there can be no doubt that the Revere Insurance Company would have been liable for it upon that policy. The Revere policy having attached, it could terminate only by the expiration of the risk, by the agreement of the parties, or by some means provided by the contract. The risk had not terminated at the time of the loss. The parties had not agreed to vacate the policy. The policy, however, provided for its determination at the will of the company; this, however, was conditioned upon notice being given of the termination; no notice was given. The policy remained in force, and the Revere Insurance Company was liable upon it. On November 2, the Revere Insurance Company declined the risk. Upon the facts, as reported, the company could not decline the risk, except by terminating the same by notice, which was not given. Jackson and Hinckley, the agents of the Revere Insurance Company, concluded to put the risk in the defendant

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company; this they had no authority to do. They had the option originally to insure in either company, but, having exercised that option in a mode which constituted a valid contract between the plaintiff and the Revere Insurance Company, their power was exhausted. Rights had become fixed, which they could not at their will change. If, before the loss, there had been any evidence of the plaintiff's assent to the change, it might have been made; but there was no such evidence. It appears as a fact, that Wood, who was the agent of the plaintiff to procure the insurance, and upon whose application the policy in the Revere Insurance Company was written, knew before the fire that the policy had been made by the Revere Insurance Company. He, having made the application to Hinckley for the insurance, and having left him the option of the office in which insurance should be effected, upon learning that the insurance was made in the Revere Insurance Company, made no objection to it; his failure to do so would be a ratification of the selection, if such ratification were necessary; for, upon the determination of Jackson and Hinckley to insure in the Revere Insurance Company, and upon the writing of the policy, the company in which insurance was to be made being wholly in their option, the contract was complete. There was no condition precedent to the taking effect of the contract. The mode of payment of premium was understood by the parties, and no objection was then or is now made that either payment of the premium or delivery of the policy was a condition precedent to the consummation of the contract.

The loss was one, therefore, for which the Revere Insurance Company was liable. There is no claim that insurance either was, or was contemplated to be, in more than one of the two companies; and we think that the report of the case shows that the exact legal effect of the acts in relation to the insurance was understood by the parties, and that all parties understood that, upon the facts, the Revere Insurance Company was responsible to the plaintiff for the loss. Inasmuch, however, as Jackson and Hinckley, who completed the insurance for the Revere Insurance Company, were also agents of the defendant company, with power to bind it; and inasmuch as they had determined to vacate the insurance in the Revere Insurance Company and to insure in the defendant office, it is supposed that this action is

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brought because, as between the two companies, the equities are in favor of the Revere Insurance Company, and that equitably the defendant company should pay the loss; that as between the two companies equitably the insurance by the defendant company was a reinsurance in behalf of the Revere Insurance Company.

The fire occurred on November 2, 1875. On December 2, following, the plaintiff made proof of loss to the Revere Insurance Company but not to the defendant. On June 5, 1876, the plaintiff demanded the policy declared on of the defendant, which did not deliver it; on June 14, 1876, proof of loss was made to the defendant company, and on September 18, 1876, this action was commenced. The report finds: "It further appeared that the Revere Insurance Company was the party really interested as plaintiff in this suit, in consequence of an arrangement made between said company and the Massasoit Steam Mills Company, and that the Massasoit Steam Mills Company claimed to hold only one of the two companies, the Western Assurance or the Revere."

If the plaintiff under a mistake, whether of law or fact, made his claim against a company which was not liable, such mistake will not preclude it from recovering against a party who is liable. We do not, however, see that any such mistake was made, nor do we perceive that any party supposed any mistake was made. If the defendant company is liable, the Revere Insurance Company can have no possible interest in the plaintiff's legal claim against the defendant; and we cannot see how the Revere Insurance Company can have a legal interest in the plaintiff's claim against the defendant; and we can see no reason why the Revere Insurance Company should be interested except as above stated, and that, because of the relation of Jackson and Hinckley to each company, as between these two companies, the defendant should equitably bear the loss. But such a claim cannot be recognized in a suit at law in the name of the plaintiff against the defendant.

The legal rights of the parties to this action are to be determined by the decision of the question whether at the time of the fire there was an existing contract covering the subject insured between the plaintiff and the Revere Company. There was no

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agreement by the defendant to insure, except in substitution for the insurance by the Revere Insurance Company, or by insurance to take effect upon the termination of the Revere Company's insurance. If the contract with the Revere Insurance Company was an existing contract, the agreement of the plaintiff was necessary in order effectually to substitute another insurance; of such agreement there is no evidence. If there was a subsisting agreement between the plaintiff and the Revere Insurance Company, that agreement was not terminated before the fire, and the other contingency to insure after the expiration of the Revere policy has not arisen. For the reasons before stated, it is clear that had the fire occurred at 10 o'clock in the morning instead of at 10 o'clock in the evening of November 2, the Revere Insurance Company must have been liable for the loss; but it could not have been liable unless there was, at that time, a subsisting contract between the parties; and that there was then a subsisting contract there can be no doubt.

The result therefore is, that, according to the terms of the report, there must be *Judgment for the defendant.*

JEREMIAH C. CHASE *vs.* WILLIAM E. PIKE & others.

Suffolk. March 6. — July 29, 1878. COLT & SOULE, JJ., absent.

It is no defence to an action of replevin by a seller of property, which he sold and delivered to the purchaser on condition that the right of property should remain in him until the whole of the agreed price had been paid, that a third person lent the purchaser part of the money which he paid to the seller, and that the third person, having obtained possession of the property, mortgaged it, and afterwards tendered the agreed price to the seller.

REPLEVIN of a mare against William E. Pike, Volney H. Covell and Alden Bartlett. Writ dated February 14, 1876. The answer contained a general denial, and averred that the property in the mare and right of possession were in the defendants Covell and Bartlett, and that Pike, the other defendant, was, as their agent, keeping the mare.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff testified that he was the owner of the mare, and about

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May 18, 1875, sold her to A. D. Webber for $1200, to be paid by the delivery of a horse then owned by Webber and valued at $200, and the balance in thirty days; that the horse was delivered and the sum of $950 in cash paid to him within the thirty days, leaving $50 due; that within the thirty days, and when there was due him $800 upon the mare, he met Webber and the defendant Covell at the latter's stable in Boston and was offered two notes signed by Covell and indorsed by other parties for $800, which he declined to take; that on the same day Webber brought him $750 and wanted to take the mare, which the plaintiff declined to let him do until the whole sum was paid, and it was then agreed between the plaintiff and Webber that the plaintiff should take the $750 and deliver the mare conditionally to Webber to take her to Manchester, New Hampshire; that the mare should remain the property of the plaintiff until the $50 and the cost of keeping were fully paid, and Webber should pay that as soon as he came back from Manchester; that the plaintiff delivered the mare to Webber on these conditions, but Webber never paid the same or tendered it, though he returned with the mare from Manchester within a short time after he so took her, and that the plaintiff frequently demanded the money and the mare of Webber, and the money was not paid nor the mare delivered to him; that he made the trade with Webber alone, and did not know that Covell had any interest in it.

Covell was permitted, against the objection of the plaintiff, to testify that he furnished to Webber $200 in money in the first instance, and afterwards $750; that he also credited Webber with the horse given by the latter to the plaintiff, so that all that was paid by Webber to the plaintiff was furnished by Covell; that the mare came into his possession and he paid her board afterwards, and was paying it at the time when she was replevied; that he met the plaintiff at his stable in Boston, before the thirty days expired, and offered him the two notes, amounting to $800, but he declined to take them; that he then told the plaintiff to go home and he would send him the money in an hour; that he immediately got $750 and gave it to Webber and told him to go and give it to the plaintiff and get the mare, and tell the plaintiff that he would pay him the balance

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at any time he would call for it; that Webber took the money and the same day brought the mare to him; and that she had been in his possession ever since, and the plaintiff had seen her in his possession frequently.

He was also permitted, against the objection of the plaintiff, to testify that at different times, before and at the time of the replevin, he offered to pay the plaintiff the sum of $50 due, and to pay for keeping the mare while the plaintiff kept her after the trade, but that the plaintiff said he had no right to take the money from any one except from Webber, without the consent of the latter. It was contended by the defendant and argued to the jury that this was a good tender for the amount due.

The defendants also called J. P. Silsby as a witness, who testified, against the objection of the plaintiff, that his wife took a mortgage on the mare from Covell, and let Covell have the money for the same; and that he also offered to pay to Covell the balance due to the plaintiff, before bringing this action, and asked the plaintiff to give a bill of sale of the mare to Covell, which the plaintiff declined to do; and the defendants contended that this also was a good tender.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

S. J. Thomas, (*R. Lund* with him,) for the plaintiff.

C. G. Keyes, for the defendants, contended that the evidence tended to prove that Covell was an undisclosed principal, and entitled to make a tender of the price.

LORD, J. It seems not improbable that there exists somewhere a misapprehension respecting this case. It has been argued by the defendants' counsel, as if the question was whether the undisclosed principal of a buying agent could enforce the contract of the buyer for his own benefit. But no such question arises in this case. The answer does not set up such defence. It does not appear by the bill of exceptions that any evidence was offered tending to show that Webber, in purchasing the mare, made the purchase for the defendant Covell, or that Covell was other than a mere stranger to the trade between Webber and the plaintiff. If Covell lent money to Webber with which to pay the plaintiff, that created no relation between Covell and the plaintiff which, in law, entitled Covell to the benefit of Web-

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ber's bargain with the plaintiff. There is nothing in the bill of exceptions tending to show that Covell is any other than a mere stranger, attempting to assume the benefit of Webber's trade. The fact that Webber allowed the mare to go into Covell's possession for some undisclosed reason has no legal bearing upon the case; while the transaction between Covell and Silsby seems to have been wholly *res inter alios acta.*

Exceptions sustained.

ROBERT C. AMOS *vs.* EDWIN H. BENNETT & another.

Suffolk. March 8. — July 29, 1878. COLT & SOULE, JJ., absent.

In an action on a bond given by one partner to another, on the dissolution of the firm, and conditioned that the obligor should pay the debts of the firm and hold the obligee harmless thereon, it appeared that the obligee assigned the bond to the creditors, and, partly before and partly after the assignment, paid certain of the creditors the amount of their debts, some by a check which he borrowed and gave his note for, and some by notes, and that the creditors receipted their bills. *Held*, on the defendant's exceptions, that the notes were to be presumed to be negotiable notes; that, this being so, there was *primâ facie* evidence of payment of the debts; and that the facts that the payments were voluntary and that the bond had been assigned were immaterial.

CONTRACT, against Edwin H. Bennett and Charles Haynes, upon a bond dated December 15, 1874, naming the plaintiff as obligee, in the sum of $3000, signed by the first named defendant as principal, and the other as surety, and containing the following condition:

"The condition of the obligation is such that whereas the said Amos & Bennett, doing business under the firm name of Amos & Bennett, and proprietors of the Avon Club House, 30 Avon Street, Boston, have contracted certain debts in fitting up and furnishing said house, and for supplies thereof; said parties have this day dissolved said partnership; said Amos has conveyed to said Bennett all his interest in said house, and in and to said furniture, fixtures, goods, effects and credits of said firm, and retires from said partnership; and the said Bennett continuing said business, in consideration of the conveyance aforesaid, and of said Amos retiring from said house, hereby agrees to assume

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and pay all the rent, carpenters', painters' and plumbers' bills, for supplies, and all other bills and debts contracted for and on account of said firm business. Now if said Bennett shall pay the same and hold said Amos harmless on account, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue. Nothing herein shall be construed to prevent said Bennett from contesting claims which he may deem improper." Bennett was defaulted; and Haynes alone defended.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared that the plaintiff and Bennett, as copartners, established an eating-house; that, in fitting it up and carrying it on, Bennett contributed about $600, and the plaintiff contributed nothing, and they contracted debts to the amount of $2700 or more; that they carried on this eating-house about two months, still owing these debts, when they dissolved the partnership, and the bond in suit was then given; and that the plaintiff, having no attachable property, on January 12, 1875, executed an assignment of the bond to his creditors, "as security for my indebtedness to said parties;" and delivered the bond and assignment to the attorney of the creditors, who had since retained them.

The plaintiff testified that he borrowed a check for the amount of the debt to certain of his creditors, giving his note for the same, for the purpose of paying the debt, and passed the check to them in payment of the debt, but whether this was before or after he made the assignment of the bond he did not remember; and that, after he made the assignment, he gave his promissory notes, payable on demand, to other creditors, one to each for the amount of his debt. He also produced the bill of one of them, which bore the word "settled" written over the signature of an attorney, as the receipt he took on giving his note for that debt, and testified that he believed he got the same kind of receipts from the rest of the creditors, on giving them notes as above stated; and those creditors testified at the trial that they approved the settlements by notes.

The plaintiff further testified that payment had not been demanded or made on either of the above mentioned notes, and that he and Bennett examined all these bills and found them correct. Haynes testified that he had paid the bills of several other creditors of Amos & Bennett.

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The plaintiff contended that there had been a breach of the bond; and the judge, by request of the plaintiff, directed the jury to assess the sum due if they found a breach.

The defendant Haynes asked the judge to rule that, it appearing that the plaintiff had parted with all interest in the bond, and there being no evidence that the plaintiff ever paid any of the debts before he assigned the bond, there had been no breach; that the bond could not be prosecuted in the plaintiff's name for the benefit of creditors of Amos & Bennett; and that damages could not be assessed for the payments made by notes of Amos to creditors.

The judge refused so to rule, and instructed the jury that the mere fact that the bond was assigned would not prevent the action being maintained either for the benefit of the plaintiff or for the benefit of the creditors whose claims had been settled by the plaintiff; and that if payment had been made by note and check, such payment by note, where satisfaction was acknowledged, would be sufficient and equivalent to cash.

The jury returned a verdict for the plaintiff in the sum of $1001.36, being the amount of the money paid and notes given, and interest; and the defendant Haynes alleged exceptions.

T. L. Livermore, for the surety. 1. The money actually paid is the measure of damages, even if judgment is suffered for the balance. *Valentine* v. *Wheeler*, 122 Mass. 566. The only exception to this is where negotiable notes are given. There was no evidence in this case that the notes given by the plaintiff were negotiable. Giving a bond for the debt of another, even where it is accepted as payment, will not warrant a verdict in an action against that person for money paid to his use, or for contribution. *Taylor* v. *Higgins*, 3 East, 169. *Maxwell* v. *Jameson*, 2 B. & Ald. 51. *Cumming* v. *Hackley*, 8 Johns. 202.

2. It was error to rule that a recovery could be had for the benefit of the creditors. *Wallis* v. *Carpenter*, 110 Mass. 347. *Valentine* v. *Wheeler*, *ubi supra*. The bond was assigned to the creditors as security for the original debts. Those debts were paid by the plaintiff's notes after the assignment. No contract in evidence put the bond in the creditor's hands as security for these notes, and therefore the creditors had no interest in the bond, or right of recovery thereon.

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3. No recovery could be had for the plaintiff's benefit, because he paid without demand on him, and without receiving an assignment of his bond, to which he was entitled. The payment was then a voluntary one, on account of which he was not entitled to indemnity. *Skillin* v. *Merrill*, 16 Mass. 40. *Munroe* v. *Easton*, 2 Johns. Cas. 75. Furthermore, the last clause of the bond, to wit, "Nothing herein shall be construed to prevent said Bennett from contesting claims which he may deem improper," controlled every other provision which would otherwise have permitted the plaintiff to pay without demand on the defendant Bennett. No such demand was made on Bennett, either by the plaintiff or his creditors. This clause was as much for the protection of the surety as of Bennett, and ought to be given every possible effect for the benefit of the surety.

C. H. Chellis, for the plaintiff.

LORD, J. There seems to be no valid objection to the several rulings in this case. The case finds that Amos paid several debts, against the payment of which the bond in suit was given to him as an indemnity. In one case he borrowed the money, or a check upon which he was to receive the money, and paid the debt with the proceeds of the loan. In other cases he gave his notes, which were accepted as payment. In this Commonwealth, a negotiable promissory note given for a debt is, in the absence of all proof, payment. A non-negotiable note is not payment. The defendant objects that it does not appear that the notes were negotiable. It is the duty of the excepting party to make it appear that the exception is well taken. If a bill of exceptions is capable of two constructions, equally consistent with the other facts stated in the bill, the construction which sustains the ruling is to be deemed the true one. It is enough to say that it is, at least, as probable that the notes given were negotiable, as that they were non-negotiable. No question upon this point appears to have been made before the presiding justice at the trial; and it is not to be presumed that a rule of law so familiar was overlooked by the court and by the parties; but rather that the point is now first raised here, upon the discovery that the bill of exceptions is susceptible of two constructions.

Nor can the objection, that the payment by Amos was a voluntary payment, prevail. The case from our own reports, *Skil-*

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lin v. *Merrill*, 16 Mass. 40, cited by the defendant in support of the objection, is decisive against it. In that case, payment was made by the surety before the liability was fixed, and the co-surety had made arrangements for the surrender of the principal, by which he would be relieved from all liability. In deciding it, Chief Justice Parker says: "In the case of a voluntary payment of money actually due, to avoid a suit, there is no doubt that he who pays the money may compel his co-surety to contribute." In the case at bar, it is found that the several amounts paid were absolutely due. The fact that the bond was assigned is an immaterial fact. Suit must be brought in the name of the assignor, and all defences are open to the defendant. There is no claim made that the bond had been released, discharged or satisfied. The only claim made is that the legal effect of the bond may be different from what the defendant expected when he entered into the obligation. Of course, this objection cannot prevail. When a party affixes his name to an obligation, he is bound by the legal construction of such obligation, not by any other construction which he attaches to it. If Amos had borrowed of a third party money for the special purpose of paying the debts of the partnership of Amos & Bennett, upon which he was liable, and with such money had paid the debts, there is no rule of law which would prevent the assignment of the bond to the lender as collateral to the loan. Between such a transaction and the facts in this case there is no difference in principle.

Exceptions overruled.

IRA BLANCHARD *vs.* WILLIAM R. MCKEY & another.

Suffolk. March 12. — July 29, 1878. COLT & SOULE, JJ., absent.

In an action by the mortgagee of personal property against the mortgagor's consignee, who, after the date of the mortgage, in good faith received the property and made an advance thereon, the defendant offered to show that the mortgage "was made with intent to defeat and defraud the creditors of the mortgagor, and to keep the property from coming into the hands of such creditors, and that the plaintiff shared in this fraudulent intent;" also "that, at the time the mortgage was given, the mortgagor was insolvent, and was indebted to the plaintiff, and the mortgage was made with intent to prefer him, and the plaintiff knew this." *Held*, that a ruling, that the first offer was immaterial, was erroneous.

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TORT for the conversion of a lot of leather and shoe stock.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff put in evidence tending to show that on March 10, 1875, the property in question was owned by and in the possession of Knowlton and James, a firm doing business in Boston, who on that day mortgaged it to the plaintiff, to secure a preëxisting debt and a sum of money then lent, the mortgagors having the right to "sell in the ordinary way of trade;" that this mortgage was duly recorded on the day it was given; that on March 10 or 11, but not until after the mortgage was given, Knowlton and James were unable to meet their business paper, failed and subsequently went into bankruptcy; that on May 1, 1875, the plaintiff demanded the property of the defendants, but they refused to give it up.

The defendants, who also did business in Boston, offered to show that on March 11, 1875, Knowlton and James consigned the goods to them, and that they, in good faith and without knowledge of the mortgage to the plaintiff, advanced $940 to Knowlton and James on the consignment.

The defendants also offered to show that the mortgage, under which the plaintiff claimed title, was made with intent to defeat and defraud the creditors of Knowlton and James, and to keep the property from coming into the hands of such creditors, and that the plaintiff shared in this fraudulent intent; that, at the time the mortgage was given, Knowlton and James were insolvent, and were indebted to the plaintiff, and the mortgage was made with intent to prefer him, and the plaintiff knew all this; that within one month thereafter, Knowlton and James filed their voluntary petition in bankruptcy, and their bankruptcy proceedings are still pending; that the defendants had no reason to believe, and did not believe, that the consignment to them was made with intent to interfere with or in any way evade the provisions and purposes of the bankrupt act; and that on May 12, 1877, the assignees in bankruptcy of Knowlton and James made an assignment to the defendants of all their rights to the property in question.

The judge ruled that these facts would not entitle the defendants to defend against the plaintiff's claim; and directed a verdict for the plaintiff. The defendants alleged exceptions.

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M. F. Dickinson, Jr. & J. Fox, for the defendants.

E. Avery, (*C. S. Lincoln* with him,) for the plaintiff.

LORD, J. At the time the defendants made the advance, Knowlton and James were apparently in good credit. Such advance, made in good faith and in the belief that the consignors were solvent and with no contemplation of bankruptcy, would entitle the defendants to hold the same against the assignee of Knowlton and James in bankruptcy, should the firm afterwards be adjudged bankrupt. The defendants offered to prove that the mortgage to the plaintiff "was made with intent to defeat and defraud the creditors of Knowlton and James, and to keep the property from coming into the hands of such creditors, and that the plaintiff shared in this fraudulent intent." If this was so, the plaintiff, by such fraud, could acquire no title against the defendants, who, the next day, in good faith received the goods and made such advance upon them. This is elementary. It is to be observed that the offer is not simply to prove a voluntary conveyance without consideration, but to prove a fraudulent purpose, in which the plaintiff participated, to defraud creditors.

According to the bill of exceptions, we must understand that the presiding justice ruled such evidence to be immaterial.

We are not, however, without strong apprehension that the presiding judge understood the offer of proof to extend no further than to show that the mortgage to the plaintiff was fraudulent only as against an assignee in bankruptcy, by reason of its giving to the plaintiff a preference over other creditors under the bankrupt law. That is a very different question. The bill of exceptions shows that, beside such offer, the offer was, in terms, that the mortgage was made with intent to defeat the creditors of Knowlton and James, and to keep the property from coming into their hands, and that the plaintiff shared in this fraudulent intent. And we should be very strongly inclined to construe the subsequent offer, "that, at the time the mortgage was given, Knowlton and James were insolvent, and were indebted to the plaintiff, and the mortgage was made with intent to prefer him, and the plaintiff knew all this," as a limitation of the previous offer of a general fraudulent purpose to defeat creditors, except that the point is distinctly made, and was strongly urged by the defendants' counsel at the argument, that the ruling

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went to the full extent of deciding that, if the mortgage was fraudulent and void at common law, such fact would be immaterial under the circumstances of this case. No suggestion was made by the plaintiff's counsel at the argument that such was not the true construction of the bill of exceptions. And though, as before stated, apprehensive that the presiding judge did not intend thus to rule, we think that, as the offer appears in the bill of exceptions, we are compelled to give to the ruling such construction. *Exceptions sustained.*

GEORGE L. WHITMAN & another *vs.* HARUM MERRILL.

Suffolk. March 18. — July 29, 1878. COLT & AMES, JJ., absent.

A judgment in replevin for the plaintiff does not necessarily show that the taking was unlawful.

If the rescission of a sale, voidable through the purchaser's fraud, is made after an attachment in good faith of the goods by a creditor of the purchaser and immediately before a replevin of the goods by the seller, the detention of the goods by the attaching officer is but momentary, for which he is liable only for nominal damages.

REPLEVIN of a lot of woollen cloths. The defendant was defaulted, and the parties subsequently agreed that the default should stand and the defendant take part in the assessment of damages. At the hearing, before *Colburn*, J., the following facts appeared:

The plaintiffs were commission merchants in the city of New York, and Harvey B. Wilmot was a manufacturer and dealer in ready-made clothing at store No. 263 Washington Street, Boston, his establishment consisting of a large room on the street level, one or two chambers over it, and a large room, up two or three stories in a building, in the rear of the store, but which communicated with the store by an iron door at the back of the main store, and a long flight of stairs. This large room was used by Wilmot as a cutting room, and there was no access to it except from the main store, by the iron door and stairs.

On July 22, 1876, the plaintiffs sold to Wilmot certain woollen cloths, amounting to $2628.70, which were received by Wilmot, on July 24, and immediately placed in his cutting room, and his

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cutters proceeded to cut these goods, with others, into garments, and continued at the work until Saturday evening, July 29, 1876, when nearly or quite all the cloths were cut up, or partially cut up, into garments.

In the afternoon of Friday, July 28, the defendant, a deputy sheriff, having a writ in which one Hawley and another were the plaintiffs and Wilmot the defendant, went to the store of Wilmot and made an attachment. There were at that time, in the principal room of the store, goods worth $40,000 or $50,000. Merrill arranged with Wilmot that his business should not be interrupted by the attachment, except that no goods should be carried away, but such as might be sold and the proceeds turned over to Merrill. Merrill put a keeper in charge of the store, who remained in the principal room, with instructions to allow no goods to be removed from the store, except such as should be sold and the proceeds paid over to him, but further than that, not to interfere with Wilmot's operations or business. Merrill, in his return on the writ, under date of July 28, 1877, stated that he "this day attached as the property of the within named Harvey B. Wilmot, the stock of clothing and other goods and chattels, and the fixtures, including an iron safe, in store No. 263 Washington Street, in said Boston, and placed the same in charge of keepers."

On August 2, 1876, the plaintiffs, contending that the cloths had been fraudulently purchased from them, brought this replevin writ, and on that day a deputy sheriff made service thereof and took from the cutting room most or all of the cloths, nearly or quite all of which had been cut up, or partly cut up, for garments.

Prior to the service of the replevin writ, neither the defendant nor his keeper knew of the existence of the plaintiffs' cloths, or of the cutting room, or of the means of access thereto, though the keeper had seen the employees of Wilmot pass in and out through the room where he was on Friday afternoon and Saturday, but what work they were engaged in, he did not know. The defendant had no information until August 2, when the goods were replevied, that any goods in or about the establishment belonged to any one but Wilmot, and no demand was made upon him until the service of the writ. When the replevin writ

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was served, Merrill agreed upon the value of the goods for the purpose of fixing the amount of the replevin bond.

It appeared in evidence that the market or salable value of the plaintiffs' cloths was greatly reduced by cutting them up for garments, and the plaintiffs contended that the defendant was liable in this action for all the damage done to the goods by cutting after he made the attachment on July 28. The defendant contended that he was only liable for nominal damages. There was no evidence of any depreciation of the goods or of damage done to them after the attachment except by the cutting.

The judge found that the cutting, which was done after the attachment, caused a depreciation in the value of the plaintiffs' cloths amounting to $235, and that damages should be assessed in that sum, with interest from August 2, 1876, if the defendant was liable for the depreciation so caused, under the above facts. But the judge, being of opinion that the facts did not render the defendant liable for the depreciation and damage caused by the cutting, assessed damages in the sum of one dollar. The plaintiffs alleged exceptions.

S. Hoar, for the plaintiffs. It was admitted, by the default, that before the date of the writ the defendant had unlawfully taken the plaintiffs' cloths, and was then in the unlawful possession of them. The exceptions show that this unlawful taking was on July 28, 1876, on which day the defendant attached the goods as the property of one Wilmot. "Any deterioration of the goods, while in possession of the defendant after the unlawful taking, is a proper subject of damages." *Gordon* v. *Jenney*, 16 Mass. 465, 470. *Clark* v. *Martin*, 120 Mass. 543. Morris on Replevin, (2d ed.) 193. Sedgwick on Damages, (6th ed.) 629, & notes.

If the plaintiff in replevin proves the value of the goods at the time of the unlawful taking, and their diminished value at the time when they were taken on the replevin writ, he has thereby, if he succeeds on the merits, shown his title to the amount of the depreciation as damages; and it is of no consequence whether the depreciation is from natural or from accidental causes, whether the goods were injured by lightning or by the prudent endeavor of the wrongdoer to preserve them, or by the unauthorized acts of strangers. It is the fact of damage that

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gives the plaintiff his title thereto, and not the acts or means by which it was inflicted. The ruling was therefore erroneous.

L. W. Howes, for the defendant.

LORD, J. A fallacy of the plaintiffs is the assumption that a judgment for the plaintiff in replevin necessarily implies an unlawful taking of the replevied goods by the defendant. This is not so. Replevin lies for an unlawful detention, although the original taking was lawful.

In this case, there is nothing to show the taking by the defendant to have been unlawful. The plaintiffs sold and delivered to Wilmot a bill of goods, being those replevied. A stranger could treat the goods thus delivered to Wilmot, while in his hands, as Wilmot's; could purchase them, could perform labor upon them, and a creditor of Wilmot might attach them as his. The plaintiffs, however, contend that the sale to Wilmot was voidable, and we are to assume it as voidable by reason of Wilmot's fraud. But, as to third persons dealing with the property in good faith without knowledge of the fraud, the sale is good until rescinded by the plaintiffs. This rescission did not take place till after the attachment; nor does it appear to have been till immediately before the replevin. No detention of the goods by the defendant after such rescission is shown, except a momentary one; and for that nominal damages only were properly assessed.

Exceptions overruled.

WILLIAM WILTON *vs.* MIDDLESEX RAILROAD COMPANY.

Suffolk. March 19. — July 29, 1878. AMES & MORTON, JJ., absent.

If a child, while riding with due care on the platform of the car of a horse railroad corporation, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the parent of such child may maintain an action against the corporation for the loss of services of the child occasioned by such injury.

An action by a parent against a corporation, for the loss of services of his child occasioned by an injury to the child through the negligence of a servant of the corporation, is not barred by the fact that the child, by his parent as next friend, has already recovered damages against the corporation for the same injury.

TORT for loss of services of Ellen Wilton, a daughter of the plaintiff, occasioned by her being run over by one of the defendant's cars on July 16, 1868. Writ dated June 22, 1874.

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At the trial in the Superior Court, without a jury, before *Pitman*, J., it appeared that Ellen Wilton had, in the name of her father as next friend, brought an action against the defendant, and recovered $5000 for the injuries done her by this accident. 107 Mass. 108. It also appeared that there had been a guardian appointed by the court, who had paid the plaintiff four dollars a week under the order of the court, and had provided some clothing for Ellen.

Evidence was offered tending to show that the defendant, after diligent search, had never been able to find any person who saw the accident, or any driver who drove the car on which the accident is alleged to have occurred. All the evidence as to the accident was that introduced by the plaintiff, and was as follows:

Ellen Wilton testified: "I am twenty-one years and two months old. I met with an accident on the railroad on Charlestown Bridge on July 16, 1868; I was twelve years and seven months old at that time; four of us girls were going over Charlestown Bridge, and a Charlestown Neck car was going over slowly; on its side was painted 'Middlesex R. R.' The driver called us on; he said, 'Come on, girls, and have a ride.' They all got on, and I was getting on; had one foot on, when the driver slapped his horses with the reins, and I hallooed to him to stop half a dozen times, but he paid no attention; then I fell off or was jerked off. The horses started on a gallop when the driver slapped them. I got on the front of the car; the other girls got on front; I had one hand on one iron on the side, and one on the other, and one foot on one step; I was dragged on the ground five or six yards; I was hallooing to him to stop, and he did n't; the wheel went over my arm."

Ellen Dempsey testified: "I was present when Ellen Wilton got on the car; I was thirteen years old at the time; four of us were standing on the curbstone of the old draw; a car came along; the driver told us to hop on or get on; Ellen was barely on the car, had one foot on; I do not believe the driver knew any of us; the car was going slowly when we got on; no one was on front but the driver; we did not attempt to go into the car; in the middle of the draw the driver slapped the horses; they gave a gallop, and Ellen was thrown forward off the car; when she fell I hopped off; she was picked up; the driver drove

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off like everything; the car had gone over her arm." On cross-examination, she testified: "I could have gone behind the driver; there was nothing to prevent Ellen from getting farther, except that she had not time to do so; before we got off the draw, Ellen fell off."

This was all the evidence in the case as to the accident; and the defendant contended that the plaintiff had not made out a case, and asked the judge to rule as follows:

"1. Upon all the evidence, there has been shown such a want of due care on the part of Ellen Wilton that the plaintiff cannot recover.

"2. From the evidence, it appears that it was the intention of both Ellen Wilton and the driver that she was to ride upon the car without paying her passage, and the defendant therefore was not a common carrier as to this plaintiff.

"3. On the question of damages, if the plaintiff has received any pay or money from his daughter out of the verdict, paid him as her next friend, or in any way for board, or on account of her relation to him as daughter, such amount must be deducted from the damages, if any; and if the amount received is equal to the loss of service, then he cannot recover at all.

"4. The former action having been brought by the plaintiff, and money having been paid to him as next friend, he cannot maintain an action for any loss of service, because he has already been paid therefor."

But the judge refused so to rule; and ruled that there was evidence of due care on the part of the plaintiff; that the defendant was a common carrier of passengers as to this plaintiff, and was bound to use due care as such towards his daughter; that the former payment to the plaintiff, as next friend, had no effect to bar this action; that the money paid by the guardian, while it might be considered as extinguishing any claim the plaintiff might have had for expense incurred for the support of the child, did not take away or reduce his right to recover the reasonable value of her net earnings to her father over and above what, but for the accident, her support would have cost; and found for the plaintiff in the sum of $500. The defendant alleged exceptions.

L. M. Child, for the defendant.

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A. R. Brown, (*E. A. Alger* with him,) for the plaintiff.

LORD, J. We do not understand that the presiding justice ruled, as matter of law, that the evidence conclusively proved the exercise of reasonable care on the part of the plaintiff's daughter; but that there was evidence proper for him to consider upon this subject. That ruling we think was right, and with his finding upon the question this court cannot interfere. Whether the relation of carrier of passengers for hire existed between the defendant and the plaintiff's daughter was also a question of fact, properly to be decided by the tribunal to which the facts were submitted. The payment of fare is not a necessary condition precedent to such relation; nor does the fact that no fare was to be paid preclude the supposition that such relation existed. The same point was before this court upon the trial of the action of the daughter against this defendant; and it was there held that, under the facts proved in the case, such relation might exist. *Wilton* v. *Middlesex Railroad*, 107 Mass. 108. The question, however, does not necessarily arise in this case.

If the defendant's servant, in the course of his employment, carelessly ran over the child, and did an injury to her which resulted in a loss of service to the parent, the defendant is liable, wholly irrespective of the question whether such child was a passenger.

The previous suit is not a bar to the present. The money which the plaintiff received in the former action is not his money; nor can he appropriate it to the payment of labor which the child was bound to perform. The measure of damages in the former action was the injury to the child, and not the injury to the father. It is analogous to the cases, formerly quite frequent, in which, for injuries to a wife, the husband and wife must join for personal injuries to the wife; but, for the expenses incident thereto, the husband must bring his sole action in his own name.

The rulings requested were properly refused, while the principles acted upon by the presiding judge were quite sufficiently favorable to the defendant. *Exceptions overruled.*

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JOHN M. RODOCANACHI *vs.* JOHN H. BUTTRICK.

Suffolk. March 22. — July 29, 1878. AMES & MORTON, JJ., absent.

If a person not a party to a promissory note, for a sufficient consideration, places his name on the back of it, after it is due, changes the rate of interest on the face of the note, pays the interest then due, and subsequently pays an instalment of interest at the changed rate, he is liable as an original promisor.

An agreement to forbear, for a certain time, to enforce the performance of a contract complete in itself cannot be pleaded in bar to an action upon the contract.

CONTRACT. Writ dated January 18, 1877. The declaration alleged that John Q. Hanson and his wife made a promissory note, dated November 12, 1873, by which they promised to pay the plaintiff or order the sum of $5000, in two years from date, with interest semiannually, at the rate of ten per cent. per annum, and secured the payment of the note by a mortgage of a certain parcel of land in Chelsea; that default was made in payment of the note, and the plaintiff was about to foreclose the mortgage on that account, when the defendant, then being a holder of a mortgage on the same parcel of land, subject to that of the plaintiff, urged the plaintiff to forbear such foreclosure, and, in consideration of his so doing, offered to guarantee the payment of the principal sum of said note and interest thereon at the rate of seven and one half per cent. per annum, instead of the rate fixed in the note, and the plaintiff accepted this offer of the defendant; that the defendant thereupon, after the maturity of the note, indorsed the same, and marked thereon the rate of interest to be paid; that the plaintiff, in consideration of such indorsement by the defendant, forbore to foreclose the mortgage; that the defendant owes the plaintiff the sum of $993.48, the balance of the principal sum due on the note, and interest thereon since December 4, 1876, at the rate of seven and one half per cent. per annum. Answer: 1. A general denial. 2. The statute of frauds.

At the trial in the Superior Court, without a jury, *Allen*, J., found the facts to be as follows:

The plaintiff was the holder of the note, as alleged in the declaration, and, on its maturity, Hanson failed to pay it, he being utterly insolvent and worthless. Negotiations were thereupon

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entered into between the plaintiff and defendant, which resulted in a verbal agreement whereby the defendant undertook to indorse or assume the note for $5000, and the plaintiff agreed to forbear to foreclose his mortgage for a time not fixed, to reduce the rate of interest from ten to seven and one half per cent., and to give to the defendant a certain notice before calling on him for payment of the principal of the note. The evidence was conflicting as to the precise terms of this notice. The defendant testified at the trial that he was to receive six months' notice; the plaintiff testified that he agreed to give the defendant sixty days' notice, and that the defendant signed on these terms. The defendant, in the presence of the plaintiff, wrote his name on the back of the mortgage note. The plaintiff, at the same time, presented to the defendant a paper containing the wording of an agreement of guaranty, which he desired the defendant to copy upon the note over his signature, but the defendant refused to do so. This paper was not produced at the trial, having been lost, and its precise wording did not appear. Beyond the name of the defendant on the back of the note, and the figures "7½" written by the defendant in pencil on the face of the note, over the word "ten," expressing the original rate of interest, there was no written evidence of the transaction. The defendant gave to the plaintiff no express authority to write any memorandum over his name, and none was in fact written, before or at the trial. The defendant paid to the plaintiff the interest on the note then in arrears, and also one further instalment of interest at the reduced rate, when it became due. Soon after this last payment, the plaintiff made a written demand on the defendant for payment of the principal of the note, and, this not being complied with, he sold the land, after more than sixty days had elapsed, by public auction, under a power of sale contained in the mortgage. The property was purchased for $4750 by one Ralli, who acted in behalf of the plaintiff, and who, on receiving a deed of the property, at once reconveyed it to the plaintiff.

The defendant contended that the agreement of guaranty, if any, was conditional upon receiving the stipulated notice; that the memorandum offered by the plaintiff was defective in not containing this term of the contract; and that the plaintiff had no authority, express or implied, to create any sufficient memo-

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randum, and requested the judge to rule that there was no sufficient memorandum in writing to satisfy the statute of frauds.

The plaintiff denied that the stipulation for notice was a condition annexed to the guaranty; and contended that it was an independent agreement on his part, which might be considered as part of the consideration for the guaranty.

The judge refused to rule as requested by the defendant; found that the plaintiff agreed to give and did give the defendant sixty days' notice; and ordered judgment for the plaintiff for $610.35. The defendant alleged exceptions.

H. W. Paine & W. W. Vaughan, for the defendant.

A. E. Pillsbury, for the plaintiff.

LORD, J. It has been repeatedly held in this Commonwealth, before the passage of the St. of 1874, *c.* 404, that if a person, not a party to a note, puts his name upon the back of it at its inception, it is his note, and he is an original promisor upon it. In this case, the defendant did not put his name upon the back of the note at its inception, but did so after its maturity, when it had become an overdue and dishonored note. This was done upon a sufficient consideration, and if nothing more had been done by the defendant, his relation to the note, and the obligation created by his signature, might have presented some questions of embarrassment. But this is not all that was done by him. He personally altered the face of the note, by which he changed the terms of the contract. Over the word "ten," which expressed the rate of interest in the original contract, he placed the figures "$7\frac{1}{2}$," for the purpose of indicating that he was to pay the principal of that note and a future interest at the rate of $7\frac{1}{2}$ per cent. per annum. At the same time he paid the arrears of interest due upon the note at the rate stipulated before he altered the terms of the contract; and he subsequently recognized the transaction by the payment of one instalment of interest at the rate at which he had fixed it by the alteration of the contract. Whether his alteration of the contract, making it less onerous to the original parties to it, affected its validity as against them, is unimportant in the determination of this issue. The facts found in this case show that he intended to adopt the words of that contract, changed by himself to express the contract into which he was entering, and placed his name upon the

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paper as a signature to that note thus altered. It is immaterial upon what part of the paper a party places his name, if his purpose in placing it upon the paper is the execution of the contract. *Wright* v. *Morse*, 9 Gray, 337, and cases cited. *Essex Co.* v. *Edmands*, 12 Gray, 273. *National Pemberton Bank* v. *Lougee*, 108 Mass. 371. There can be no question then that this paper, as between himself and the plaintiff, is an original undertaking, put into the form, by him, of a promissory note for the payment of the amount expressed in the note, with interest at the rate of 7½ per cent. It therefore became simply his promissory note for that amount and interest, to the payment of which he was properly found liable.

An objection is made that the agreement of guaranty was conditioned upon receiving a stipulated notice; and that, inasmuch as that condition was not inserted in the writing itself, it therefore was not a sufficient writing to hold the party within the statute of frauds. The conclusive answer to this is, that the paper which he adopted and signed as a contract is complete in itself, and it is never competent to show in an action at law that there were other and different oral agreements from those which the contract, complete in itself, contains. If any oral agreement, founded upon such consideration as would make it a valid contract, independently of the written contract, was entered into between the parties, it was wholly collateral and could not be pleaded in bar of this suit, but damages for its breach must be sought in an independent suit. *Wright* v. *Morse*, 9 Gray, 339. *Lake* v. *Stetson*, 13 Gray, 310, note. *Essex Co.* v. *Edmands*, *ubi supra*. *Smith* v. *Bartholomew*, 1 Met. 276.

In point of fact, the presiding judge found that the plaintiff agreed to give, and did give, the defendant sixty days' instead of six months' notice of his intention to enforce the contract. Such finding, however, is unimportant, inasmuch as an agreement to forbear to enforce the performance of a contract complete in itself can never be pleaded in bar to a suit upon the contract.

Exceptions overruled.

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CALEB W. LORING, trustee, *vs.* SALISBURY MILLS.

Suffolk. Nov. 9, 1875. — June 26, 1876. Sept. 7. — 8, 1876. LORD, J., absent.
April 3, 4, 1877. — July 30, 1878. AMES, J., absent.
ENDICOTT, J., did not sit.

A trustee, appointed by deed, cannot maintain an action at law for an injury to the trust property before he became trustee, whereby the legal title passed to a third person; but the court may allow him to amend by changing the action at law into a suit in equity, under the St. of 1865, *c.* 179.

If a corporation issues a certificate of stock to A. as trustee, and has notice of the name of the *cestui que trust*, and, on A.'s wrongfully transferring the certificate, issues a new certificate without making any inquiry, it is liable to the rightful owner, if he is injured thereby, without proof of fraud or collusion between the corporation and the trustee.

If a trustee has authority to sell personal property only with the consent of the *cestui que trust*, a married woman, and pledges a portion of the property without such consent, for his own debt, the invalidity of the transaction is not affected by the direction of the *cestui que trust*, (not shown to have been acted on by the trustee,) to pledge such portion for her benefit, or by the assent of the *cestui que trust* to a sale by the trustee of another portion of the trust property; and letters of her husband, not proved to have been known to or authorized by her, cannot affect her rights.

If a trustee has, by the terms of the trust, authority only to pay the income to the *cestui que trust* as it accrues, and not by way of anticipation, he has no right to sell the trust property to reimburse himself for advances to the *cestui que trust*.

If a corporation issues stock to A. as trustee, and, with knowledge of the name of the *cestui que trust*, issues a new certificate to one to whom the trustee has, in violation of the trust, transferred the stock, it is no bar to an action against it for the wrong done to the *cestui que trust*, that part satisfaction has been received from the trustee.

TORT for an illegal issuing of certificates of stock by the defendant corporation. Writ dated December 30, 1872. At the trial in this court, before *Morton*, J., without a jury, the following facts appeared:

On March 10, 1853, an indenture was executed by Elizabeth B. Crowninshield of the first part, Francis B. Crowninshield, trustee, of the second part, and William Mountford of the third part, reciting that a marriage was intended shortly to be had and solemnized between the parties of the first and third parts, and by the terms of which Elizabeth B. conveyed to Francis certain personal property in trust, to pay the net income to her during coverture, taking her sole receipt therefor, "after such income

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accrues, and such income not at any time to be paid by way of anticipation," with provisions in case of the termination of the coverture. The indenture also contained the following clauses:

"And upon the further trust that the trustee under this instrument shall and may dispose of any part of the trust property, and the proceeds of such sale, and also any other proceeds of the trust property, invest and reinvest from time to time, and at all times, as he shall think discreet; and shall and may execute all deeds or other instruments convenient or proper to that end; and the purchaser or purchasers of said trust property shall not be bound in any manner to see to the application of the purchase money or consideration therefor. Provided, however, that said trustee shall first obtain the written approbation of said Elizabeth of such sales and investments, if she shall be at the time thereof within the United States of America."

"And in case the trustee herein named, or any trustee or trustees who may be appointed under this instrument, shall die, resign or become incapable to act, then and thereupon said trust property shall be conveyed to such other trustee or trustees as said Elizabeth may in writing appoint, to be held upon the trusts hereinbefore declared; or if said Elizabeth be not then alive, then such appointment to be made by the judge of probate, for the time being, for the county of Suffolk, and said trust property to be conveyed and held in conformity with such appointment and said trusts herein set forth."

On August 12, 1856, an indenture was executed between Francis B. Crowninshield and George H. Rogers, by which Crowninshield resigned his trust under the above named indenture, and conveyed the trust property in his hands to Rogers, with the knowledge and consent of Mrs. Mountford. Rogers died on May 21, 1870; and on August 6, 1870, the following indenture was executed by Mrs. Mountford, her husband, and Caleb W. Loring, the plaintiff in this action: "Whereas an indenture was made, bearing date the tenth day of March, A. D. one thousand eight hundred and fifty-three, between Elizabeth B. Crowninshield of the first part, Francis B. Crowninshield of the second part, and William Mountford of the third part, by which indenture certain property belonging to said Elizabeth, in a contemplation of a marriage with said William, was assigned

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and transferred to said Francis, in trust, as will more fully appear by said indenture, reference to which is hereby made as part of this instrument; and whereas said marriage was afterwards consummated between said William and Elizabeth, and said Francis resigned said trust, and George H. Rogers, of Gloucester, in the Commonwealth of Massachusetts, was appointed in his place; and whereas the said Rogers has since deceased, and the said Elizabeth, by virtue of the power to her given by said indenture, has appointed, and by these presents does now nominate and appoint, Caleb William Loring, of the town of Beverly, who is a citizen of said Commonwealth of Massachusetts, as trustee under said indenture, with all the powers and subject to all the provisions in said indenture contained. And the said Elizabeth does hereby authorize the said Caleb William Loring to receive said trust property from the executors of the will of the said George H. Rogers, or any representative of him or his estate, and does empower and authorize the said Loring to receive, take and obtain from any and all persons or corporations said trust property, and to commence and prosecute any and all actions that be necessary for obtaining possession of the same. And the said Loring on his part does hereby accept the appointment as trustee under the indenture aforesaid, and agrees to perform all the matters and duties to be done and performed by the trustee under said indenture as fully as if the same were herein specifically set forth. And it is mutually agreed between the respective parties hereto that the provisions and terms of said indenture are in full force and effect between them, the said Caleb William Loring being liable to the same extent and subject to the same obligations as are mentioned in the same."

The plaintiff also offered evidence tending to show that Rogers, while trustee, invested a portion of the trust fund held by him for Mrs. Mountford in shares in the defendant corporation, and took certificates, in some of which he was described as trustee for Mrs. Mountford, and in others as trustee simply; that the corporation had notice that he held all these shares in trust for Mrs. Mountford; that afterwards, and while trustee, he transferred these certificates to various persons, by transfers absolute in form, but in fact as collateral security for his own debts; that these certificates were surrendered to the defendant corporation,

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and new certificates issued by it to such persons, in the years 1867 and 1869, and the early part of the year 1870.

On these facts, and others not material to be here particularly stated, the judge found for the defendant; and reported the case for the consideration of the full court. If the finding was justified, judgment was to be entered accordingly; otherwise, such order or judgment was to be entered as the court might deem proper.

E. D. Sohier & C. W. Loring, for the plaintiff.

C. B. Goodrich, for the defendant.

GRAY, C. J. This suit cannot be maintained by this plaintiff in its present form. Whether it is considered in the nature of an action of trover, or in the nature of an action on the case for negligence, it is for an injury to the trust property while the legal title thereof was in Rogers. Before the appointment of the plaintiff as trustee, that title had passed to *bonâ fide* purchasers, and the claim against the corporation for the damages thereby occasioned was but a chose in action, which could not be transferred by mere act of parties, without the assent of the defendant, so as to enable the assignee to sue at law in his own name for what was never an injury to him or to property in which he had any legal title.

In *Salisbury Mills* v. *Townsend*, 109 Mass. 115, the point decided was that the question whether the corporation was liable for this tort could not be determined upon a bill of interpleader filed by the corporation, but only in a suit brought by the party defrauded; the court had no occasion to consider in whose name or in what form such a suit should be brought, or the difficulty, under the peculiar circumstances of the case, of maintaining an action at law; and that no such point was in the mind of the court clearly appears from the fact that the late Chief Justice, while intimating, both in the rescript and in the opinion, that the remedy was by action at law for damages, spoke of such remedy, in the rescript, as belonging to the present plaintiff, and, in the opinion, as belonging to the *cestui que trust*.

In *Ashton* v. *Atlantic Bank*, 3 Allen, 217, and in *Murray* v. *Dehon*, 102 Mass. 11, the suit was in equity, and the plaintiff had been appointed by the act of the law, and not by the act of the parties.

Judgment for the defendant.

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At the term at which this judgment was entered, the plaintiff moved that it be set aside, and that he be allowed to amend by changing the action at law into a suit in equity under the provisions of the St. of 1865, *c.* 179, for the reasons that the action was begun under a misapprehension of counsel, induced by the rescript in the case of *Salisbury Mills* v. *Townsend*, and that, in consequence of the lapse of time, a new action might be barred by the statute of limitations.

This motion was argued by the same counsel before the full court in September 1876.

GRAY, C. J. The plaintiff was evidently misled by the suggestion, in the rescript in *Salisbury Mills* v. *Townsend*, 109 Mass. 115, that his remedy was at law. By virtue of the terms of the original indenture, and of the power of appointment executed in accordance therewith, he has clearly become, in equity, the assignee of any rights of action for injuries to the trust property before his appointment. Justice therefore requires that he should have the opportunity of trying the question whether he can maintain his claim in equity against the defendant.

Amendment allowed.

The plaintiff thereupon filed, by way of amendment, a bill in equity, in which Mrs. Mountford was joined as a party plaintiff. Hearing, upon the pleadings and proofs, before *Ames*, J., who reported the case to the full court, for the entry of such decree as law and justice might require. The report, after stating the facts in regard to the marriage settlement, the death of Rogers, and the appointment of Loring, as above set forth, proceeded as follows:

On April 25, 1857, on the organization of the defendant corporation, Rogers, as trustee, subscribed the sum of $15,000 to its capital stock, and on April 28, 1858, on payment of the last instalment, a certificate, in the following form, was issued to him: "Be it known that George H. Rogers, trustee for Mrs. E. B. Mountford, is proprietor of one hundred and fifty shares in the capital stock of the Salisbury Mills, which shares are transferable by an instrument in writing, to be recorded by the clerk of the company; and when such transfer shall have been recorded, and this certificate surrendered to the treasurer of the company,

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a new certificate or certificates shall be issued." In July, 1858, Rogers agreed to take eighty more shares of the original stock, for which he paid on July 17; and a certificate dated July 15, 1858, was issued to "George H. Rogers, trustee." On July 26, 1858, Rogers, as trustee, subscribed for twenty shares more of the original stock, and took a certificate therefor as trustee.

On January 12, 1859, the corporation voted to increase its capital stock in the sum of $250,000. Rogers took one hundred and twenty-five shares, being his proportion, and on January 31, 1859, paid the sum of $1250 in cash, and gave his individual notes on time for $11,250, and received a certificate for the one hundred and twenty-five shares, as "trustee for Mrs. E. B. Mountford." The notes of Rogers were subsequently paid. The moneys paid for these three hundred and seventy-five shares were taken by Rogers from the trust under the indenture, and were all charged by Rogers in his account of the trust fund rendered to Mrs. Mountford under date of January 8, 1866, which account was approved by Mr. and Mrs. Mountford. The corporation had no knowledge of this account until after the decease of Rogers.

On or about May 21, 1861, Rogers made a transfer of the before mentioned eighty shares, by an instrument in writing on the back of the original certificate, by which he transferred to Nathan Pierce thirty-five shares, and to Charles U. Cotting, attorney of Elizabeth Joy, forty-five shares, as collateral security for his note of $3500. At the time of the record of this transfer, the original certificate for eighty shares was surrendered, and a certificate for thirty-five shares was issued to Nathan Pierce, as collateral security for the note of George H. Rogers, for $3500, dated May 21, 1861; and a certificate for forty-five shares was issued, absolute in terms, to Charles U. Cotting, as attorney for Miss Joy. Pierce transferred the thirty-five shares to Rogers, as trustee, on April 30, 1862, and a certificate was issued accordingly. The forty-five shares transferred to C. U. Cotting, attorney, after several subsequent transfers to different banks, as security for the note of George H. Rogers, duly recorded by the clerk of the corporation, and certificates issued, were re-transferred to George H. Rogers, trustee, on December 15, 1862, and a certificate issued accordingly. Rogers, meanwhile, by orders

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from the holders, receipted for all the dividends but one. This evidence was admitted against the defendant's objection.

On March 12, 1862, Rogers, by an instrument in writing on the back of the original certificate to him for twenty shares, transferred to M. W. Shepard five shares; to E. P. Pierce, ten shares; to John G. Davis, five shares; and, in an account of the trust fund, rendered to Mrs. Mountford on January 8, 1866, credited her with the proceeds of twenty shares sold.

On December 11, 1862, the defendant corporation voted that its capital stock be increased to the extent of $250,000, and that every stockholder of record, on December 11, should be entitled to his *pro rata* proportion of the new stock, at such time and in such form as the directors might elect, provided that no stock should be issued for a fraction of a share. The directors, on December 18, 1862, voted that a dividend of thirty-three and one third per cent. be made to stockholders of record of date the 11th instant; and that the increase of capital stock voted by the stockholders on the 11th instant be called in, on the 1st day of January, 1863. Rogers took his proportion of this stock, and a certificate for one hundred and eighteen shares, dated January 1, 1863, issued to "George H. Rogers, trustee."

These shares were credited, in the stock ledger kept by the company, to the account of "George H. Rogers, trustee;" and there were to his credit in this account, after the sale of twenty shares as above stated, four hundred and seventy-three shares. The dividends on these shares were entered in the dividend books of the company in the name of "George H. Rogers, trustee," and were receipted for in one receipt on the books by Rogers, until and including the dividend in January, 1867. Rogers held no shares as trustee for any other person; he was, individually, owner from time to time of shares in the Salisbury Mills; but, in the books of the company, his individual account was kept separately from his account as trustee.

On January 11, 1867, Rogers transferred thirty-five of the shares for which he originally held the certificate of eighty shares, dated July 15, 1858, to William A. Pew, trustee, by an absolute transfer on the back of the certificate, purporting to be for value received, which transfer was presented to the clerk of the corporation, and by him recorded on the same day, and new certificates issued.

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On January 26, 1869, Rogers transferred forty-five of the shares, part of the certificate of eighty shares, to John Botume, Jr., by an instrument in writing on the back of the certificate, purporting to be for value received. This transfer was presented to the clerk of the corporation, and by him recorded on March 15, 1869, and a new certificate issued in conformity.

Of the shares for which Rogers held the certificate for one hundred and eighteen shares, dated January 1, 1863, he on September 6, 1869, made an absolute transfer of forty of these shares to John Botume, Jr.; on September 15, 1869, forty to H. H. White, cashier; on September 22, thirty-eight shares to John Worster; all purporting to have been made for value received. These transfers were presented to the clerk of the corporation on February 18, 1870, for record, and by him recorded on the same day.

Of the shares for which Rogers held the certificate for one hundred and fifty shares, dated April 28, 1858, he, on January 24, 1870, transferred, by an instrument in writing on the back of said certificate, forty shares to John Botume, Jr. The certificate, with the transfer thereon, was presented to the clerk of the corporation on February 25, 1870, and on that day recorded. A certificate was issued to Botume for forty shares, and to Rogers, "as trustee for Mrs. E. B. Mountford," for one hundred and ten shares. Rogers took the dividends on the shares transferred to William A. Pew, in January, 1867, and the dividends in April, July and October, 1867, and in January, 1868, by order from William A. Pew. The transfers of these shares were made without the knowledge of Mr. or Mrs. Mountford, except so far as such knowledge may be inferred from the facts reported; and Mrs. Mountford was, at the time the transfers were made, in the United States, but there was no evidence that the defendant knew this fact.

The by-laws of the corporation have prescribed the form in which certificates of shares shall be issued, which is as follows:

"Be it known that proprietor of share in the capital stock of the Salisbury Mills which share transferable by an instrument in writing to be recorded by the clerk of the company, and when said transfer shall have been recorded and the certificate surrendered to

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the treasurer of the company, a new certificate or certificates shall be issued. President.

" Boston, 18 . Treasurer."

On January 8, 1866, Rogers rendered to Mrs. Mountford an account of the trust fund in his hands, which was examined and approved by Mrs. Mountford and her husband. The account commences October 1, 1856; the debits amount to the sum of $120,609.76, and consist of cash paid, furniture delivered to Mrs. Mountford, of losses sustained upon sales by Rogers of a large number of manufacturing stocks, of property unsold and on hand at its nominal valuation, and of the purchase of four hundred and ninety-three shares in the stock of the Salisbury Mills, less a deduction by credit of twenty shares sold in 1862. The credit side amounts to $120,366.68, consisting of profits made upon the sale by Rogers of a large amount of manufacturing stocks, upon the profit of a sale made by Rogers of a dwelling-house on Beacon Street, which was part of the original trust property; showing a balance due to Rogers of $243.08, which sum was credited to balance the account, and was charged to and taken from the income account. Rogers also rendered an account from October 1, 1856, to January, 1866, showing receipts and payments of income, and a balance to the credit of Mrs. Mountford for $6036.31 at the termination of the account, which was subsequently paid to her. Rogers also rendered an income account, dated January 1, 1868, commencing February 1, 1866, and ending March 20, 1867, showing a balance due to Rogers of $6255.27, which includes a balance of interest of $105.28 against Mrs. Mountford; and on March 1, 1868, Rogers rendered an income account, commencing March 20, 1867, with a debit of the above balance due to Rogers of $6255.27, which shows a balance of $5269.14 against Mrs. Mountford, including $121.83, balance of interest. No objection was made to these accounts by Mrs. Mountford during the lifetime of Rogers, or at any time since.

The plaintiff introduced two letters written by Mrs. Mountford and received by Rogers, in one of which, dated March 25, 1867, she requested him to sell on her behalf four shares in the Merrimack Manufacturing Company, or such portion as he might think fit; and in the other, dated October 16, 1868, she requested him to sell for her benefit three shares in the Merrimack Manufacturing Company.

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On June 25, 1870, George I. Marsh, one of the executors of Rogers, rendered an income account to Mrs. Mountford, commencing on March 1, 1868, with a debit of the above mentioned balance of $5269.14, and ending on May 21, 1870, showing a balance due to Rogers of $6295.65, which includes a debit of balance of interest against Mrs. Mountford of $671.23. This account was adjusted by Mrs. Mountford and Marsh, as executor, without the consent or knowledge of the defendant, its directors or any of its officers, and without notice to them. The adjustment is stated upon the account in these words: "The claim set forth in this account has been adjusted this day by payment of the sum of fifteen hundred dollars, and the same is hereby discharged. George I. Marsh, Executor. March 19, 1873."

At some time in 1862, after the transfer hereinbefore mentioned of thirty-five shares to Pierce and of forty-five shares to Cotting, Mrs. Mountford had notice of the sale and transfer of twenty shares on March 1, 1862, and did not in any manner make any objection to the defendant, its directors or officers, and did not notify them not to permit Rogers to transfer the shares which he held in the Salisbury Mills. Charles Mifflin, the brother in law of Mrs. Mountford, some ten years ago was at the office of the Salisbury Mills, and he was asked why Mrs. Mountford was selling her stock; shortly afterwards he asked this question of Mr. and Mrs. Mountford, and they replied that they were not selling it.

The defendant offered in evidence three letters addressed by Mrs. Mountford to George H. Rogers, which were found at his decease among his papers. The plaintiff objected to their admission, because there was no evidence of any pledge or sale of shares in the Salisbury Mills, in accordance with these letters, or any act done in consequence thereof, and because they were not known to the defendant corporation, and for other reasons. The judge admitted them.

The first letter, dated June 3, 1863, requested Rogers, as trustee, to sell shares of stock in certain corporations, but not mentioning the defendant, or such part of them as he might think it right so to dispose of, and to reinvest the money which might accrue from the sale of the property mentioned, in such manner as might appear to him best.

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The second letter, dated October 21, 1868, was as follows: "As the trustee of the trust property conveyed to you by my brother, I wish you to dispose of the house No. 158 Beacon Street, to E. A. Boardman, Esq., for the sum of $24,500, less the mortgage. I also wish you to sell the following stocks, in addition to those before mentioned: say, one share Boston and Lowell Railroad, and twenty shares Connecticut River Railroad; and I wish you to invest all the proceeds, with any balance on hand, (not already invested in five shares Merrimack Manufacturing Company,) in the shares of the Salisbury Mills; and for this object you may dispose of as many as wanted, from those you hold as trustee of my income, at a valuation of two hundred and fifty dollars a share, which is less than the market price. I further wish that, as my agent, you buy for me the house No. 101 Beacon Street, at a cost of thirty-three thousand dollars, and cause the deed to be made in my name; and in order to pay for the same, you appropriate all my surplus income in your hands, and the proceeds of the Salisbury Mills stock before alluded to; and in order to avoid at present the sale of any more of the Salisbury Mills stock, you may hire the necessary amount on the pledge of said shares, to make up the required amount to pay for said house."

The third letter, dated September 29, 1866, was as follows: "I hereby authorize and request you to hire for me the sum of 8000 dollars, on the security of some of my stock in the Salisbury Mills."

Mr. Mountford addressed two letters to Rogers, without dates, which were found, after the death of Rogers, with his papers, and were also admitted in evidence, subject to the plaintiff's objection. In one of them, he proposed "our borrowing money on some of the Salisbury stock;" and, in the other, he said: "My need of money is very imminent; you must sell stock, I think, if you cannot borrow the money, only not Merrimack, Amoskeag or Manchester Print."

The estate of Rogers was represented insolvent, and commissioners were appointed, to whom the plaintiff Loring, as trustee, presented a claim "for damages by reason of his conversion of one hundred and fifty-eight shares in the Salisbury Mills to his use, by transferring the same to different individuals, as collateral for

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his own debt." The claim was allowed in the sum of $21,867, upon which sum the plaintiff has received two dividends, one of forty, the other of thirty per cent.

The executors of Robert C. Hooper proved against the estate of Rogers the amount of a note for $6000, for which they held forty shares in the Salisbury Mills as collateral security, and were allowed $5969, the amount of the note of Rogers less a deduction of interest, upon which the plaintiff Loring received the dividends, by order of the executors, he having paid to them the amount of a note given by Rogers for $6000, and for which they held forty shares of the Salisbury Mills, by an absolute transfer originally made to John Botume, as hereinbefore stated, which were in fact held by Hooper as collateral security for said note.

The plaintiff Loring has redeemed sundry shares, without any notice to the defendant of the amounts severally claimed by the parties holding the shares.

The plaintiffs seek to recover against the defendant corporation for the damages sustained by reason of the conversion by Rogers of the shares held by him as trustee of Mrs. Mountford, with interest, less the seventy per cent. dividends paid by the estate of Rogers.

The plaintiffs, in answer to an inquiry by the court, said they did not allege any fraud or intentional collusion with Rogers on the part of the officers of the defendant corporation; and they did not allege any notice, except such as might be inferred from the character of the various certificates issued.

Neither the directors of the defendant corporation, nor its officers, had any knowledge or information of the consideration or purpose for which Rogers transferred the shares; or any knowledge that he was acting in fraud of his duty as trustee, except so far as the same may be inferred from the facts reported.

The defendant contended that the plaintiffs were not entitled to maintain their action for any supposed breach of trust by Rogers; that Rogers, by the terms of his subscription, and of the certificates issued to him, was the proprietor of the shares, and authorized to transfer them by complying with the by-laws of the corporation which prescribe the mode of transfer; that Mrs. Mountford, by recognizing the subscription of Rogers for shares in the defendant corporation, conferred upon him a power

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to do everything, according to the by-laws of the corporation, incidental to his subscription and ownership; that the marriage settlement conferred upon Rogers, as trustee, an absolute authority to transfer; that Mrs. Mountford, by her letters to Rogers, authorized him to sell the Salisbury Mills shares, or to pledge them as security for money borrowed; that the defendant corporation was not a trustee of Mrs. Mountford, and had no duty to perform in relation to the trust conferred upon Rogers; that no fact had been established, upon which the defendant could be charged with any wrongful act or omission; that proof against the estate of Rogers, for damages resulting from a conversion by him of the shares, ratified the original transfers; that the plaintiff Loring, by redeeming the shares, without notice to the defendant of the amount claimed by the holders, was estopped from proceeding against the defendant for damages; that Mrs. Mountford, by adjusting the balance due from her to the estate of Rogers, as shown by the account rendered to her by the executor of Rogers, without notice to the defendant, was estopped from setting up any claim against the defendant, resulting from the fraud of Rogers.

The case was argued in April 1877, by the same counsel.

Gray, C. J. When the holder of a certificate of shares in a corporation is the absolute owner, his assignment and delivery thereof will pass the title to the assignee; and the latter, upon surrendering the former certificate, may obtain a new one in his own name. *Stone* v. *Hackett*, 12 Gray, 227. Gen. Sts. *c.* 60, §§ 9, 10, 13. St. 1870, *c.* 224, §§ 22, 23, 26. If the holder appears upon the face of the old certificate to be the absolute owner, and the corporation has no notice that the fact is otherwise, it may safely issue a new certificate to the assignee, which, if taken in good faith and for a valuable consideration, will vest a perfect title in him. *Salisbury Mills* v. *Townsend*, 109 Mass. 115. *Pratt* v. *Taunton Copper Co.* 123 Mass. 110. But, for the protection of the rights of the lawful owner of the shares, the corporation is bound to use reasonable care in the issue of certificates: if, by the form of the certificate or otherwise, the corporation has notice that the present holder is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged, with-

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out evidence of such authority, to issue a certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the rightful owner is injured by its negligent and wrongful act, the corporation is liable to him, without proof of fraud or collusion. All the authorities affirm such liability where the corporation has notice that the present holder is a trustee and of the name of his *cestui que trust*, and issues the new certificate without making any inquiry whether his trust authorizes him to make a transfer. *Lowry* v. *Commercial & Farmers' Bank*, Taney, 310. *Bayard* v. *Farmers' & Mechanics' Bank*, 52 Penn. St. 232. *Atkinson* v. *Atkinson*, 8 Allen, 15. *Shaw* v. *Spencer*, 100 Mass. 382. *Fisher* v. *Brown*, 104 Mass. 259. *Duncan* v. *Jaudon*, 15 Wall. 165.

The cases of transfer of stock by the Bank of England,* cited by the learned counsel for the defendant, depended, as was pointed out by Chief Justice Taney, in *Lowry* v. *Commercial & Farmers' Bank*, upon the peculiar provisions of acts of Parliament. Taney, 335. The case of *Duncan* v. *Luntley*, 2 Macn. & Gord. 30; *S. C.* 2 Hall & Twells, 78, was decided upon the ground that the bill alleged that the act of the officers was unauthorized by the company. And the latest English case upon the subject goes quite as far as any of the American authorities in protecting equitable rights in shares held in trust. *Shropshire Union Railways* v. *The Queen*, L. R. 7 H. L. 496.

Upon the evidence, there can be no doubt that the defendant corporation had notice that all the shares in question were held by Rogers in trust for Mrs. Mountford. At the organization of the corporation, Rogers subscribed for one hundred and fifty shares, and took out a certificate in this form: "Be it known that George H. Rogers, trustee for Mrs. E. B. Mountford, is proprietor of one hundred and fifty shares in the capital stock of the Salisbury Mills, which shares are transferable by an instrument in writing, to be recorded by the clerk of the company; and when such transfer shall have been recorded, and this certificate surrendered to the treasurer of the company, a new certificate or certificates shall be issued." In 1858, Rogers subscribed succes-

* *Hartga* v. *Bank of England*, 3 Ves. 55. *Bank of England* v. *Parsons*, 5 Ves. 665, 669. *Pearson* v. *Bank of England*, 2 Cox Ch. 175. *Davis* v. *Bank of England*, 2 Bing. 393, 407.

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sively for eighty and for twenty more shares, and took the certificates therefor in the name of "George H. Rogers, trustee," without naming his *cestui que trust*. But in 1859, upon the corporation increasing its capital stock by one half, Rogers, then holding, as we have seen, certificates for two hundred and fifty shares, namely, one hundred and fifty as trustee for Mrs. Mountford, and the additional one hundred as trustee simply, took the proportion of the new stock, to which he was entitled on the whole two hundred and fifty shares, in a single certificate for one hundred and twenty-five shares, as "trustee for Mrs. E. B. Mountford," thereby clearly signifying that he held all the old shares as well as the new, being three hundred and seventy-five shares in all, in trust for her. In 1862, Rogers sold the twenty shares subscribed for in 1858, and accounted to Mrs. Mountford for the proceeds thereof, and the remaining three hundred and fifty-five shares continued to be held by him upon the same trust. In 1863, under a vote of the corporation further increasing its capital stock by one third, and allowing each stockholder of record to take his *pro rata* proportion, Rogers took a certificate for one hundred and eighteen shares (being one third of three hundred and fifty-five, excluding fractions) in the name of "George H. Rogers, trustee." He then held four hundred and seventy-three shares, the whole of which and of the dividends accruing thereon were credited on the books of the corporation in one account to "George H. Rogers, trustee," and the dividends, as they were paid, were receipted for by him in one receipt upon those books.

The corporation, thus having distinct notice that Rogers held all these shares as trustee for Mrs. Mountford, was bound, upon the principles already stated, when he afterwards undertook to transfer the shares, to inquire whether the terms of the trust authorized him so to do.

By the indenture of trust, the trustee was authorized to sell, invest and reinvest the trust property, only upon first obtaining the written approbation of Mrs. Mountford, the *cestui que trust*, if at the time within the United States; and it appears that she was within the United States at the times of all the sales and transfers complained of.

The invalidity of these sales and transfers is not affected by Mrs. Mountford's knowledge of and assent to the sale of the

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twenty shares by Rogers in 1862, nor by her written assent to his sale of other property, nor by her request (which is not shown to have been acted on by him or known to the defendant) to pledge some of her shares in the defendant corporation for her benefit. The letters of her husband, not proved to have been authorized by her, cannot affect her rights. As Rogers, by the terms of the trust, had no authority to pay the income to Mrs. Mountford, except as it accrued and not by way of anticipation, he had no right to sell the trust property to reimburse himself for advances to her, and her settlement with his executor of a claim for such advances is no bar to this suit.

The transfers complained of having been made by the defendant corporation without due inquiry into the authority of Rogers to make them, and being invalid against the *cestui que trust*, and the new trustee appointed in the place of Rogers not being able, as we have already held, for technical reasons, to maintain an action at law against the corporation, he is clearly entitled to maintain this bill in equity. *Ashton* v. *Atlantic Bank*, 3 Allen, 217.

Rogers and the corporation both contributed to the wrong done, and the proof of the claim against the estate of Rogers, one of the wrongdoers, was no affirmance of the validity of his acts, and is no bar to a suit against the corporation, the other wrongdoer, except to the extent of the satisfaction received by the dividends out of the estate of Rogers. *Elliott* v. *Hayden*, 104 Mass. 180.

The result is, that the plaintiff is entitled to the relief prayed for, and the form of the decree must be settled before a single judge. *Decree for the plaintiff.*

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LUTHER A. WRIGHT & others *vs.* HORATIO G. HERRICK.

Suffolk. March 5. — July 30, 1878.

A., with the consent of B., did business in his name, and bought goods of C. and also of D., who both gave credit to B. C. brought an action against B. and attached goods as his property. Subsequently D. brought an action against A., doing business under the name of B., and attached the same goods. C. was then allowed, without notice to D., to amend his writ by adding the name of A. as a defendant, and declaring against A. and B. as copartners doing business under the name of B. Both C. and D. recovered judgments. As between A. and B., the latter had no interest in the attached goods. *Held*, that the goods attached were first to be applied in satisfaction of the execution obtained by C. on his judgment; and that the amendment was immaterial

TORT against the sheriff of Essex for the alleged wrongful act of his deputy. At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts appeared:

The plaintiffs attached certain personal property, on a writ against William W. Phillips and Edward Martin, as copartners, doing business under the name of Henry Phillips, on March 24, 1875. It was afterwards sold on mesne process, on a prior attachment, on a writ in favor of Edward Martin against Henry Phillips, which last named writ was never entered in court. The plaintiffs recovered judgment against William W. Phillips and Martin, in the Superior Court for the county of Suffolk at January term 1876, and placed the execution duly issued thereon in the hands of the defendant's deputy, and requested him to apply the proceeds of the personal property in satisfaction of the execution. This he declined to do except in part, but first applied the same in satisfaction of an execution issued from the Police Court of Haverhill, on December 1, 1875, upon a judgment in favor of Matthew Plumstead, Jr., recovered on November 15, 1875, against Henry Phillips, William W. Phillips and Martin, as copartners, doing business under the name of Henry Phillips. Plumstead's writ was dated March 24, 1875, and commanded the officer to attach the property of Henry Phillips; and thereon, upon March 24, prior to the attachment in the suit of the plaintiffs against William W. Phillips and Martin, the deputy did attach the personal property as the property of Henry Phillips. Subsequently, and before judg-

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ment in the action, by leave of the Police Court, and without notice to the plaintiffs, Plumstead amended his writ and declaration by declaring against Henry Phillips, William W. Phillips and Martin, as copartners doing business under the name of Henry Phillips. William W. Phillips and Edward Martin carried on the grocery business and used the name of Henry Phillips, by his permission and consent, in making purchases, and the goods attached were so bought; and the debts of the plaintiffs and Plumstead, on which their judgments were obtained, were contracted in the name of Henry Phillips. Between the parties, Henry Phillips had no interest in the attached goods; but this was not known to Plumstead.

Upon these facts the defendant asked the judge to rule that Henry and William W. Phillips and Martin, as to third parties, were copartners; and that the deputy rightfully satisfied the execution of Plumstead before that of the plaintiffs; and that the plaintiffs were not entitled to recover in this action. The judge refused so to rule, and found for the plaintiffs; and the defendant alleged exceptions.

J. P. Jones, for the defendant.

W. E. Jewell, for the plaintiffs.

ENDICOTT, J. It appears from the bill of exceptions that the debts of the plaintiffs and Plumstead were contracted in the name of Henry Phillips, who had consented to the use of his name by William W. Phillips and Martin in making purchases. Both the plaintiffs and Plumstead trusted Henry Phillips, and the goods were sold on his credit. As to them, therefore, he was undoubtedly a partner, although as between himself and William W. Phillips and Martin he had no interest. He was the nominal and ostensible partner, and the use of his name rendered him liable both to the plaintiffs and to Plumstead. *Ex parte Watson*, 19 Ves. 459. In an action by the firm, the defendant could set off a separate debt due from Henry Phillips against the debt for which he was sued, the firm being conducted in the name of Henry Phillips only. Collyer on Part. (5th Am. ed.) § 763. *Stacey* v. *Decy*, 2 Esp. 469, note; *S. C.* 7 T. R. 361, note. A dormant partner need not join with the ostensible partner against a person who has dealt with the latter only; and it is at the option of a plaintiff to join the dormant partner as a

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defendant, or not. *Wood* v. *O'Kelley*, 8 Cush. 406. *Ex parte Hamper*, 17 Ves. 403. Story on Part. §§ 241, 263. The action, therefore, brought by Plumstead against Henry Phillips could be maintained for the recovery of his debt, and an attachment of the property of the firm purchased in the name of Henry Phillips would be good against William W. Phillips and Martin, who had held him out as the ostensible partner and procured the goods upon his credit.

It was held in *Lord* v. *Baldwin*, 6 Pick. 348, that the creditor of an ostensible partner, who gave him credit as a single individual, was not to be postponed in his attachment upon the goods of the partnership to another creditor, who afterwards attached the same stock for a debt created upon the same credit, though he should have discovered a concealed partner, and set up his claim as a partnership creditor. And it was said by Chief Justice Parker that "all the creditors sold their goods or made their contracts with the ostensible, visible partner. They trusted to him personally and to the goods upon which he was trading as his. The dormant partner is brought to light by *ex post facto* investigation, and he is made responsible, not because he was trusted, but because he secretly enjoyed the profits of the business." And again he says: "The question now is, whether, when all the creditors have trusted the man of business and apparent owner of the goods, any one of them, who is behind the rest in his attachment, shall supplant them and gain priority because he has discovered this concealed liability. At the time the debt was created, he stood upon the same footing with the rest; he trusted John Brown and the goods in his possession; so did they. They have taken possession first of the fund which was held out to the public as the means of credit, and it might be, and probably was, in this very case, that the goods attached are the identical goods which they sold to the party sued. There would be then no pretence of equity, and we think not of law, in allowing a preference founded on no meritorious distinction of circumstances."

In that case several attachments were made in suits against John Brown alone, and a fourth attachment was made upon the same goods against John Brown and Aaron Brown as copartners. It was decided that they were copartners, and it was held that

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this last attachment did not take precedence of the previous attachments. The only difference between that case and the case at bar is, that the creditors there dealt directly with John Brown and delivered the goods directly to him. In this case the plaintiffs and Plumstead dealt with Henry Phillips through William W. Phillips and Martin, and whether they regarded them as agents, or in what capacity, does not appear; nor does it appear that they knew that the goods were not delivered to Henry Phillips. As the case is presented, it is not to be distinguished from *Lord* v. *Baldwin*, above cited. See also *French* v. *Chase*, 6 Greenl. 166; 3 Kent. Com. (12th ed.) 65; Story on Part. § 241; Collyer on Part. §§ 822, 948. Plumstead, therefore, would have been entitled under his attachment, which was prior to that of the plaintiffs, to have had his execution satisfied before the plaintiffs, without an amendment of his writ. He lost no rights by amending his writ. The cause of action was not changed, and the amendment could properly be allowed. Gen. Sts. 129, § 41. No notice was necessary to the plaintiff, as he was not injuriously affected by it. *Tucker* v. *White*, 5 Allen, 322.

The defendant's deputy, therefore, properly applied the proceeds of the property attached to the satisfaction of Plumstead's execution, and the presiding judge erred in not ruling as requested. *Exceptions sustained.*

JAMES H. BEAL *vs.* BOSTON CAR SPRING COMPANY.

Suffolk. March 20. — July 30, 1878. AMES & MORTON, JJ., absent.

A lessor, who, in consideration of the assignment to him, by the lessee, of certain underleases of parts of the demised premises, accepts from the lessee a surrender of the original lease, "but without prejudice to the leases of parts of the premises assigned to him," may maintain an action against a sub-lessee for rent accruing after the assignment.

CONTRACT for rent due under a written lease made by Heyer Brothers to the defendant for the term of five years from April 1, 1874, and by Heyer Brothers assigned to the plaintiff.

At the trial in the Superior Court, before *Allen*, J., it appeared in evidence that the premises described in the lease of Heyer Brothers to the defendant constituted a part of the same prem-

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ises which Heyer Brothers held under and by virtue of a lease to them for a term of ten years from April 1, 1874, made by the plaintiff, who was the owner of the premises; that on February 7, 1877, when the plaintiff received the assignment from Heyer Brothers of their lease to the defendant, he executed upon the back of the original lease from himself to Heyer Brothers the following instrument: "Boston, February 7, 1877. The within-named lessor, in consideration of the assignment to him of certain underleases made by the within-named lessees of parts of the premises demised in the within lease, and of one dollar to him paid by the within-named lessees, doth hereby release and forever discharge the said lessees, their heirs, executors and administrators, of and from all claims, demands and causes of action of and concerning the within lease, and especially all claims by him for rent thereunder; and said lessees do hereby surrender and yield up the said lease and the premises within described to said lessor, and such surrender is hereby accepted by him, but without prejudice to the leases of parts of the premises assigned to him as above mentioned." It further appeared that the terms of this instrument were carried out, and that Heyer Brothers ceased to occupy the premises.

The defendant offered to show that it had not been in the occupation of the premises since February 7. This evidence was objected to as being immaterial, and was excluded.

The defendant contended and asked the judge to rule that if, by the arrangement entered into between the plaintiff and Heyer Brothers, the original lease was on February 7, 1877, given up, discharged or vacated, and the tenancy of Heyer Brothers thereupon ceased, and the plaintiff resumed control of the premises, and Heyer Brothers at the same time assigned and transferred to the plaintiff the underlease before then held by the defendant from them; and if the defendant, when informed of this, ceased to have anything further to do with the premises, and refused to recognize as longer subsisting or continuing in force the underlease given to them by Heyer Brothers, or to become liable to the plaintiff as assignee thereof in any way, the plaintiff could not maintain his action.

The judge refused so to rule, but ruled that the plaintiff was entitled to recover; and directed the jury to return a verdict for the plaintiff. The defendant alleged exceptions.

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F. A. Brooks & A. S. Hall, for the defendant.

E. W. Hutchins, for the plaintiff.

ENDICOTT, J. The plaintiff, being the owner of the estate, leased the same for the term of ten years to Heyer Brothers; and they, on the same day, leased a part of the premises to the defendant for a term of five years. It is to be inferred from the subsequent agreement between the plaintiff and Heyer Brothers that other underleases were made. Before the expiration of the underlease to the defendant, Heyer Brothers assigned it to the plaintiff; who at the same time indorsed on the original lease to Heyer Brothers an agreement releasing them from rent and accepting the surrender of their lease and the premises, "but without prejudice to the leases of parts of the premises assigned to him." This agreement was made in consideration of the assignment to the plaintiff of the underleases by Heyer Brothers.

The intention of the parties is plain. Heyer Brothers having made underleases of parts of the premises which the plaintiff was willing to take, and desiring also to surrender the reversion in these leases to the plaintiff, which he was willing to accept, the underleases were assigned, including the defendant's, and the surrender of the original lease accepted without prejudice to the underleases. They evidently did not intend that the rights of the plaintiff under the assignment, or the estates of the sub-lessees, should be destroyed by the surrender, for the language of the acceptance carefully provides for both. The purpose was to put the plaintiff precisely in the position of Heyer Brothers. This intention, as expressed in the papers they have executed, will be carried out, if consistent with the rules of law, and we are of opinion that it is.

The plaintiff brings this action, as assignee of the lease, to recover upon the defendant's covenant to pay rent; and it is well settled that when a lease is assigned without the reversion, the privity of contract is transferred, and the assignee may sue in his own name for the rent accruing after the assignment. *Kendall* v. *Carland*, 5 Cush. 74. *Hunt* v. *Thompson*, 2 Allen, 341. The only objection suggested to the plaintiff's right to recover is the surrender of the lease of Heyer Brothers to the plaintiff; and the claim is, that the rent due from the defendant is an incident of the reversion in Heyer Brothers, and, the reversion hav-

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ing been extinguished by the surrender, all remedies incident to it are taken away. But rent is not necessarily an incident to the reversion, so that it cannot by the acts or agreements of the parties be separated from it. In a general grant of the reversion, the rent will pass as incident to it. *Burden* v. *Thayer*, 3 Met. 76. But the reversion may be granted and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed in the words they use. Lord Coke says that fealty is an incident inseparably annexed to the reversion, and the donor or lessor cannot grant the reversion and save to himself the fealty; but the rent he may except, because the rent, though it be an incident, yet is not inseparably incident. Co. Lit. 143 *a*, 151 *b*. 3 Cruise Dig. 337. *Demarest* v. *Willard*, 8 Cow. 206. Heyer Brothers therefore could have granted their reversion, or surrendered it to the plaintiff and reserved the rent accruing upon the underleases. In such a case, their relations to the sub-lessees would not be changed by the grant or surrender of the reversion, and they could have recovered rent of this defendant upon the covenants of its lease. Having that estate reserved in the premises, they could have assigned it to a third party or to the plaintiff, and the assignment would have been good, and the defendant would have been bound to pay to the assignee rent for the estate held under its lease. This form of proceeding was not adopted by the parties, but the same result was accomplished. As the assignments were simultaneous with the surrender, Heyer Brothers did not in terms reserve the rent to themselves, but the plaintiff accepted the surrender in consideration of the assignment, with the express stipulation that it should not prejudice the underleases assigned to him; that is, should not invalidate the assignment, or affect the rights of the parties holding the leases.

The case is not presented, what would be the rights of Heyer Brothers against this defendant; or what would be the rights of the plaintiff, if he had not taken an assignment of the underleases, and had accepted a surrender without qualification. The two cases of *Grundin* v. *Carter*, 99 Mass. 15, and *Webb* v. *Russell*, 3 T. R. 393, relied on in support of the proposition of the defendant, have no application to the facts here presented.

Exceptions overruled.

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FIFTY ASSOCIATES *vs.* JAMES J. GRACE.

Suffolk. March 21. — July 30, 1878. COLT & MORTON, JJ., absent.

A lease to A. contained covenants to pay rent, for use and occupation of the "premises for and as a dry goods and millinery store," and that no assignment of the same should be valid without the consent in writing of the lessor. A. assigned the lease to B. with such consent, and B., with such consent, but without the knowledge of A., assigned the lease to C., to use and occupy the premises as a dye-house office. *Held*, that A. was released from liability to pay rent during C.'s occupation.

CONTRACT for the rent of certain premises on Washington Street, in Boston, and for the cost of steam heat supplied to the same.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts in substance as follows:

On January 3, 1872, the plaintiff and the defendant executed an indenture of lease of the premises for the term of five years from February 1, 1872, by the terms of which the defendant covenanted to pay to the plaintiff the rent at a certain rate "during said term, and at that rate for such further time as the lessee, or any other person or persons claiming under him, shall hold the said premises or any part thereof;" to "use and occupy the premises for and as a dry goods and millinery store;" to pay "the cost of the steam heat supplied said shop;" and not to "assign this lease nor underlet the whole or any part of the said premises," "without the written consent of the lessor or of those having its estate in the premises," the lessor to have the right to enter upon the premises and determine the lease upon the breach of any of these covenants.

On October 8, 1872, the defendant assigned his interest in the lease, in writing, under seal, to Sarah and Solomon Milkman, upon condition that they should pay the rent and for the steam heat, and perform the covenants of the lease and save him harmless therefrom; and they also in writing, under seal, agreed so to do, and to "use and occupy said premises for the millinery business and sale of hair goods." The plaintiff consented in writing to the assignment, provided such consent should not invalidate the claims which it had or might hereafter have against the defendant if he had not assigned. The defendant there

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upon left the premises, and Sarah and Solomon Milkman entered upon and occupied the same. On December 2, 1872, Sarah and Solomon Milkman assigned in like manner their interest in the lease to Richard S. Sibley, who agreed in like manner to perform all the covenants of the lease, and to "use and occupy said premises as an office of the Boston dye-house." The plaintiff consented in writing to the assignment to Sibley, providing that such consent should not invalidate any claim it would have against Sarah and Solomon Milkman as assignees of the lease, if they had not assigned. The latter thereupon left the premises, and Sibley entered and continued in occupation thereof until March 22, 1877.

The assignment of Sarah and Solomon Milkman to Sibley, the contract of Sibley to occupy the premises, and the written consent of the plaintiff, the occupation of the premises by Sibley, and the leaving of the premises by Sarah and Solomon Milkman, were without the knowledge or consent in any way of the defendant, who was not aware that Sibley was occupying the premises until January, 1877, when the plaintiff's agent informed him that Sibley had not paid his rent.

The rent for the months ending November 1, December 1, 1876, and January 1, February 1, March 1, and the fraction of a month ending March 22, 1877, with the cost of steam heat supplied, has never been paid, and the same was demanded of the defendant after the last date and before suit.

The defendant never paid any rent, nor was any demand made upon him for rent of the premises from the time of his assignment to Sarah and Solomon Milkman, except as before stated, after the termination of the lease and occupancy of Sibley. Sibley paid rent to the plaintiff for the occupation of the premises from December 2, 1874, to the month ending November 1, 1876.

Upon the foregoing facts, or such of them as were admissible in evidence, judgment was to be entered for such sum, if any, as the court should determine to be due from the defendant to the plaintiff; otherwise, judgment for the defendant.

E. D. Sohier & C. A. Welch, for the plaintiff.

T. F. Maguire, for the defendant.

ENDICOTT, J. By the terms of the original lease, the defendant covenants and agrees with the lessor that he "will use and

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occupy the premises for and as a dry goods and millinery store." It is clear that he could not use it for any other purpose, and, upon breach of this covenant, the plaintiff could reënter, as provided in the lease. The lease also contains the covenant that the defendant will not lease or underlet the premises without the written consent of the plaintiff or those having its estate. The assignment to the Milkmans was made by the defendant with the written consent of the plaintiff, and they agreed to occupy and use the premises for the millinery business and sale of hair goods. Whether this was a change in the occupation prescribed by the lease is immaterial; if it was, the defendant's liability on the covenants to pay rent would continue, for his assignment was assented to by the plaintiff with the express stipulation that its claim against him should not be affected by the assignment and its assent thereto.

But by the assignment to Sibley by the Milkmans, to which also the plaintiff consented in writing, Sibley was to use and occupy the premises as an office for the Boston Dye House. This was a new and different occupation of the premises, and Sibley having been allowed so to use and occupy with the assent of the plaintiff, and without the assent or knowledge of the defendant, the defendant was released from liability on the covenant to pay rent, certainly while such occupation continued, for he had covenanted to pay only according to the terms of the lease.

It is contended by the plaintiff that the covenant to use the premises for a millinery store was for the benefit of the lessor, and could be waived. This may be true while the defendant was in occupation; but, after he had parted with the estate, though still liable on his covenants to pay rent, a new contract could not be made in regard to the purpose for which the premises should be used, without his consent, given in such a manner and under such circumstances as to show that he was still to be held liable under his lease.

The effect of the assent by the plaintiff to the assignment to Sibley, for a different use and occupation, was to create a new tenancy inconsistent with the terms of the lease to the defendant, and his liability for rent, while such tenancy continued, ceased. See *Amory* v. *Kannoffsky*, 117 Mass. 351, and cases cited. *Judgment for the defendant.*

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WILLIAM E. BICKNELL *vs.* WILMOT CLEVERLY.

Suffolk. March 15. — July 31, 1878. COLT & SOULE, JJ., absent.

In an action against an officer for the conversion of personal property attached by him on a writ against A., in whose possession the property was, it appeared that the property had been mortgaged by A., and the mortgage assigned to the plaintiff merely to indemnify him against liability as indorser of A.'s note; and that, after the attachment, the plaintiff made a written demand upon the defendant as follows: "I hereby demand of you the sum of two hundred dollars, which is the amount due me on" the mortgage (describing it). *Held*, that the demand, though informal, was sufficient.

TORT, by the assignee of the mortgagee of certain personal property, for its conversion. Answer, a general denial, and that the defendant, an officer, attached the property in question on a writ against the mortgagor.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff put in evidence the following demand, made by him in due season upon the defendant: "I hereby demand of you the sum of two hundred dollars, which is the amount due me on a mortgage" (describing it). The plaintiff also put in evidence tending to show that he was the assignee of the mortgage, and had purchased it, and that there was due him upon it the sum of two hundred dollars.

The defendant put in evidence tending to show that the plaintiff indorsed a note for the accommodation of the mortgagor, and that the mortgage was assigned to him merely to secure him against liability as such indorser.

The judge instructed the jury that if the mortgage was assigned to and held by the plaintiff simply and solely to indemnify him, in case he should be called upon to pay as indorser on the note held by the mortgagee, then the demand made upon the officer was not in compliance with the statute, and was inoperative.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Herrick, for the plaintiff.

C. Q. Tirrell, for the defendant.

MORTON, J. The only question in this case is as to the correctness of the instruction given to the jury.

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When mortgaged personal property is attached by a creditor of the mortgagor, it is the duty of the mortgagee, in order to dissolve the attachment and retain his lien, to demand payment of the officer or attaching creditor of the amount for which the property is liable to him, and to "state in writing a just and true account of the debt or demand for which the property is liable to him." Gen. Sts. *c.* 123, §§ 62, 63.

Any material misstatement in the account, which tends to mislead or in any way to injure the attaching creditor, renders the demand inoperative to dissolve the attachment, and defeats the right of the mortgagee to maintain an action against the attaching officer.

But it has been held that innocent inaccuracies or errors in the account, resulting from accident or mistake, and which do not mislead or injuriously affect the attaching creditor, do not invalidate the demand or defeat the mortgagee's right to enforce his lien. *Rowley* v. *Rice*, 10 Met. 7. *Harding* v. *Coburn*, 12 Met. 333. *Hills* v. *Farrington*, 6 Allen, 80. *Folsom* v. *Clemence*, 111 Mass. 273.

In the case at bar, the plaintiff's demand was for "the sum of two hundred dollars, which is the amount due me on" the mortgage. It would have been more formal and proper if it had stated that he held the mortgage as security for his liability as indorser of a note upon which two hundred dollars was due. But the error or informality of the statement did not tend to mislead or injure the attaching creditor. It has been held that, in cases of mortgages given to indemnify the mortgagees against future contingent liabilities, a creditor of the mortgagor may make a specific attachment of the mortgaged property, instead of resorting to the trustee process; and that in such a case the mortgagee must make a demand and notice which should be adapted to the character of his mortgage. *Haskell* v. *Gordon*, 3 Met. 268. *Codman* v. *Freeman*, 3 Cush. 306. *Hanson* v. *Herrick*, 100 Mass. 323. *Putnam* v. *Rowe*, 110 Mass. 28. But in such a case the creditor can only retain his attachment by paying or tendering to the mortgagee the amount for which the property is liable to him, within ten days after the same is demanded. Gen. Sts. *c.* 123, §§ 62, 63. The statutes do not authorize the creditor or the court to substitute any other security

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for the mortgage, but the only mode in which the creditor can prevent a dissolution of his attachment is by paying or tendering the amount for which the property is liable.

In this case, therefore, if the plaintiff had in his demand stated specifically that the mortgage was held to indemnify him against his liability as indorser of a note upon which the sum of two hundred dollars was due, the attaching creditor could have only preserved his attachment by paying or tendering that sum. He was not in any way injuriously affected by the inaccuracy of the plaintiff's statement.

We are therefore of opinion that the ruling of the Superior Court was erroneous. *Exceptions sustained.*

SUMNER CHENEY *vs.* LORING W. GLEASON & others.

Middlesex. Jan. 22. — June 26, 1877. MORTON, ENDICOTT & SOULE, JJ., absent.
Jan. 18. — July 24, 1878. COLT & ENDICOTT, JJ., absent.

Where the owner of a parcel of land employs a broker to sell it for him, and the broker, by fraudulent representations respecting the value of another parcel of land, induces him to make a conveyance of his land to a third person, also a party to the fraud, and to take in exchange the parcel concerning which the representations were made, and the third person conveys the land to a purchaser in good faith, and takes a mortgage to secure a part of the purchase money, a bill in equity by the person so wronged, in which he seeks to obtain an assignment of the mortgage, and restitution in damages, is not, under the Gen. Sts. *c.* 127, § 1, terminated by the death of the plaintiff; and, under the St. of 1865, *c.* 42, his executor may be admitted to prosecute on motion, without a bill of revivor.

A bill in equity by A. against B., C., D. and E., alleged that, by the false and fraudulent representations of B., a real-estate broker employed by A. to sell his estate for him, A. was induced to make a deed of his land to C., and to take in exchange a worthless equity of redemption in a lot of land owned by D.; that C. and D. were parties to the fraud; that A.'s land was afterwards conveyed to E., a purchaser in good faith, who gave a mortgage back to C. for part of the purchase money. The bill prayed for the assignment of this mortgage to A., for restitution in damages, and for general relief. On issues framed to a jury, there was evidence that B., employed as alleged, and who was also employed by D. to sell his estate, fraudulently misrepresented the value and annual rental of D.'s estate, the character of the house thereon and the neighborhood, and the fact that a responsible person was in want of the place for a hotel; and that A. was thereby induced to make a deed of his land to C., and to take a deed of D.'s land at a much larger price than it was in fact worth; that, while the transaction was pending, C. came with B. to see A.'s place, and B. and C. talked together most of the time; that,

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after the deeds were passed, C. said that he bought A.'s place through B., and that the understanding was that, when B. found a good chance to trade, he was to let C. know; that D. afterwards admitted that he only received a portion of the difference in price between the valuation of his estate, as expressed in the deed, and that of A.'s estate. The defendants put in no evidence. *Held*, that the evidence was sufficient to warrant a finding in favor of the plaintiff against the defendants B., C. and D.; that the maxim *caveat emptor*, as applied by courts of law to affirmations between a buyer and seller respecting land, did not apply; that as the plaintiff did not seek to rescind, and could not rescind, the entire contract, on account of the sale of his land to a purchaser in good faith, evidence of a settlement with D. for an alleged incumbrance on D.'s land was immaterial. *Held, also*, that a request for an instruction that there was no ground for presumption against the defendants from the fact that they produced no witnesses, was properly refused. *Held, also*, that, on the question of fraud, evidence of the value of the estates and of the accompanying circumstances was admissible.

A decree in equity was entered by a single justice of this court, ordering that one of the defendants should forthwith convey to the plaintiff a certain mortgage and a note secured thereby; that the case should then be referred to a master, to ascertain the amount of damages suffered by the plaintiff, after deducting the value of the mortgage assigned to the plaintiff; and that the defendants should pay the plaintiff the amount of damages, together with the costs of suit, to be taxed by the master. From this decree the defendants appealed, and, pending the appeal, the master proceeded to assess the damages. *Held*, that the merits of the case were not open on the appeal; that the decree was not a final decree, and that the appeal therefrom did not work a stay of proceedings; that the direction that the master should tax the costs was erroneous; and that on the defendant's not producing and assigning the mortgage, the master was justified in assessing damages, without regard to the value of the mortgage.

A suit in equity by A. against B., C. and D. was referred to a master to assess the damages sustained, through the fraud of the defendants, by A., in being induced to sell to one of them a parcel of land, and to take in payment an equity of redemption in a parcel of land owned by D. The master made up the account by charging the defendants with the value of A.'s land, and deducting therefrom the amounts received by A. from rents, and a small sum received from a sale of D.'s estate by a mortgagee, after paying the mortgage. The master refused to deduct the value of a watch given by D. to A. in satisfaction of an incumbrance existing on the estate at the time of the sale, which he covenanted against. *Held*, that the deed of D.'s estate and of A.'s estate were properly admitted in evidence; that evidence, offered by the defendants, of the value of D.'s estate was immaterial; and that the value of the watch should have been deducted from A.'s damages.

BILL IN EQUITY, inserted in an original writ of summons and attachment, dated July 16, 1872, against Loring W. Gleason, Kiles P. Gleason, Henry Pearson and Sarah N. Charlebois, alleging that a deed was procured from the plaintiff, conveying a parcel of land in Reading to the defendant Kiles P., by means of the false and fraudulent representations of the defendant Loring W., a real-estate broker employed by the plaintiff to sell

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the same for him on commission; and that the plaintiff was induced by such false and fraudulent representations to take in exchange a worthless equity of redemption in a lot of land in Boston belonging to Pearson; that Kiles P. and Pearson were parties to the fraud; and that the land in Reading was afterwards conveyed to the defendant Charlebois, who purchased the same in good faith, without knowledge of the fraud, and gave a mortgage back to Kiles P., which he now holds, to secure part of the purchase money. The bill prayed that the defendants might be restrained from transferring this mortgage to any other person, and might be required to assign it to the plaintiff, make restitution in damages, and for general relief.

The defendants severally filed answers denying fraud, and containing demurrers on the ground that the plaintiff had a plain and adequate remedy at law. The answer of the defendant Pearson also alleged that Pearson, two or three weeks before the sale to the plaintiff, agreed to sell his equity of redemption in the lot of land in Boston to Kiles P. Gleason, for $3000; that this sum was all he received for the conveyance, which was made to the plaintiff, at the request of Kiles P.; that, at the time, he supposed the estate was free from incumbrances, except certain mortgages; that afterwards, being informed that there was an outstanding lease, he paid the plaintiff $50 in money and a gold watch in full settlement of any claim he had or might have by virtue of the covenants in the deed to the plaintiff.

After the decision overruling the demurrers, reported 117 Mass. 557, the case was tried, before *Wells*, J., on the following issues to the jury:

"1. Was there an agreement or understanding between the defendant L. W. Gleason and the defendant K. P. Gleason, by which the said L. W. Gleason was to be interested in the property which he was employed to sell, or in the proceeds or profits of the sale or exchange of property, or to be in any way benefited or compensated for his part in the transaction, otherwise than by his commission as a broker?

"2. Did the defendant Pearson have any interest in, or know of, or participate in, that arrangement, or in carrying it out?

"3. Was the plaintiff induced to make the exchange of estates by false representations and deceit on the part of L. W. Gleason?

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"4. Did K. P. Gleason participate in the fraud and deceit practised upon the plaintiff?

"5. Did K. P. Gleason have notice, when he received the deed from the plaintiff, that the same had been procured by means of false representations?

"6. Did Henry Pearson participate in, or know of, said false representations?

"7. Has the plaintiff settled with said Pearson for the incumbrance of the land, and discharged all claim on account thereof?"

The jury answered all these issues in the affirmative, except the last, which they answered in the negative. The defendants alleged exceptions, which were duly filed and presented to the judge, who died before allowing them. By consent of parties, *Morton*, J., reported the case, in substance as follows, for the consideration of the full court, the parties agreeing that the report was correct:

The plaintiff testified as follows: "My estate in Reading consisted of seven acres of land, with a house and stable upon it, and a large grapery, and was worth $7000 in 1871. In June, 1871, I went to L. W. Gleason, and employed him as a real-estate broker to sell my estate, and agreed to pay him $250 as a commission. After this, L. W. Gleason said he had a good place in Boston to sell, and that, if I wanted to exchange, he would give me a good bargain; that the Boston place was worth $13,000, and would rent for $1500 a year; that I could come into possession on October 20; that, after paying taxes, there would be $900 or $1000 clear. We went to Chickering Place in Boston, and Gleason showed me the house, but we did not go in, Gleason giving as a reason that the tenant was fractious, and he did not like to go in. Gleason stated that the mortgage on it was $6000. Before we went to Chickering Place, Kiles P. Gleason came with L. W. Gleason to my place in Reading; I had but little talk with them; they talked with themselves most all the time; nothing was said about Kiles P. being a purchaser. I made a bargain the next day. I think L. W. Gleason said it was a trade, and I signed a $500 bond. I did not see K. P. Gleason before the deed was given. I gave the deed in L. W. Gleason's office. Pearson and L. W. Gleason were there. I

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gave my deed to L. W. Gleason, and he gave me a deed of the house in Chickering Place. Nothing was said that day about a lease. Soon after, a lease was made to Nelson. I left the house in Gleason's hands to let. Right away after the bargain was made, before the deed was given, he said he would lease it, that Nelson was good responsible man, and would pay the rent monthly. It was let for $1500 a year. The lease is dated October 3. I never received any money on account of the lease. I received a watch about two years ago from L. W. Gleason. He said something about a lease of Graham; I think he said Pearson gave it. Soon after the deeds were passed, Gleason told me Graham had a lease. I asked him how much Graham was paying; he said $1000; that Graham got it under price through a friend. He took me one side, and said that the police had driven Graham out; that he kept some women there."

On cross-examination, he testified as follows: "It seems to me that we went into an adjoining house in Chickering Place, next to No. 6. Think Gleason told me it would rent for $1500; was well worth $13,000. Think I understood he gave it as his opinion. He said Nelson wanted it to run the two houses together. Don't think the lease was signed the same day as the deed. When I took the deed, the lease was all ready for me to sign. Nelson was not there. I found out about the Graham lease just before I was to come into possession (October 6). Saw L. W. Gleason; he wanted me to wait; said he would get Graham out. Gleason gave me a watch. I supposed it was about the lease. Gleason told me it was a good and respectable neighborhood; said No. 6 was kept for a boarding-house; that it was wanted for a hotel. The property was sold under mortgage on September 2, 1872. I attended the sale. It was sold again for informality in the first sale. I think L. W. Gleason offered to raise money to take up the mortgages for me, and he tried to induce me to raise money to redeem the property. I received $85, proceeds of the sale; receipt is dated September 2, 1872. Up to April, it was in Gleason's hands, and he collected rents at rate of $1000. I told Gleason I would put it in Proctor's hands. I cannot say whether the deed to Gleason was executed and delivered the same day. I think Gleason has the $500 bond. I saw Pearson but once. I supposed Kiles P. Glea-

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son owned the Chickering Place property. Graham was in possession at the time the deed was given."

The plaintiff offered in evidence the following deeds: Pearson to Cheney, dated October 2, 1871, of Chickering Place estate, consideration $13,000; Cheney to K. P. Gleason, of estate in Reading, consideration $7000, dated October 3, 1871; K. P. Gleason to S. N. Charlebois, of same estate, consideration $7000, dated April 27, 1872; mortgage deed, Charlebois to K. P. Gleason for $3300, of same date.

Mrs. S. N. Charlebois testified as follows: "In 1872, I lived at Hyde Park. In the spring of that year, moved to Reading. Bought the Reading place of K. P. Gleason, through L. W. Gleason, for $7000. Gave the place in Hyde Park and a mortgage to K. P. Gleason for $3300. [This evidence was admitted under the defendants' objection.] The deeds were passed in L. W. Gleason's office. K. P. Gleason was not present. My deed of the Hyde Park property ran to L. W. Gleason, who did all the talking and made the trade. I did not know that the deed was to run to L. W. Gleason till deeds were passed. My husband questioned the conveyance to L. W. Gleason; he said it would make no difference, as he had made a trade with K. P. Gleason. There was a mortgage on the Hyde Park house, and K. P. Gleason paid me $300, which made the mortgages even. L. W. and K. P. Gleason came together to see the Hyde Park property."

The plaintiff offered in evidence a deed from S. N. Charlebois to L. W. Gleason, of the Hyde Park estate, consideration $8000, subject to a mortgage of $3000, dated April 27, 1872, which was admitted under the defendants' objection.

William Proctor, a real-estate agent, testified as follows: "I was acquainted with the Reading estate. In October, 1871, it was worth $7000. In April or May, 1872, Cheney came to me about the Chickering Place estate, and I applied to L. W. Gleason for the key, and endeavored to let the house, and could not. I asked Gleason what the house was let for; he said for a house of ill-fame, and could not be let for any other purpose. I afterwards found it to be so. I told him the property was not such as Cheney could hold, as he could not let it for a lawful purpose, and was of no value to him. I told Gleason he did wrong to sell it to such people; he only made a vague reply. I asked if

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Cheney knew of it; he said 'No.' I never went into the house until the mortgagee's sale. I learned the character of the house; it was notorious. Gleason said the police had closed it up. I was present at mortgagee's sale. Defendant Pearson and a friend of his were there, and ten others. I made no attempt to sell the estate after learning its character. Think it was worth a few hundred dollars above the mortgage. It would be hard to get $6000 at forced sale." There was also other evidence that, in 1871, the house in Chickering Place was worth from $5600 to $7000; that it was used as a house of ill-fame, and that all the houses in the place were used for the same purpose.

Solon Bancroft testified as follows: "The plaintiff came to me in April or May, 1872, to consult me, and, in consequence, I had interviews with Pearson and K. P. Gleason. Pearson told me that he received for the Chickering Place house $3000 above the mortgage; that L. W. Gleason sold it as his agent; that it had been used as a bed house. Kiles P. Gleason said he bought the Reading place through L. W. Gleason. The understanding was that when L. W. Gleason found a good chance to trade, he was to let him know. I made an offer to reconvey the Chickering Place estate to Pearson. Do not remember having deed. After the mortgage sale, Kingsbury brought me an account showing the balance."

Upon the plaintiff resting his case, the defendants offered no evidence, and asked the judge to rule that the plaintiff had shown no cause of action, and that the jury would not be warranted in finding for the plaintiff upon the issues. The judge declined so to rule, and submitted the issues to the jury.

The defendant Pearson requested the judge to rule, as especially applicable to his case, as follows:

"1. There is no evidence competent to show that Pearson had any interest in, or knew of, or participated in, the alleged fraudulent representations; and the answer to the second question to the jury should be in the negative. 2. There is no evidence competent to show that Pearson participated in, or knew of, such false representations; and the answer to the sixth question to the jury should be in the negative. 3. The evidence shows that the plaintiff settled with Pearson for the incumbrance of the lease, and discharged all claim on account thereof; and the

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answer to the seventh question should be in the affirmative. 4. The plaintiff waived his claim against Pearson for the breach of the covenant in his deed on account of the existence of the lease, by his recognition of the tenant under the lease. 5. The plaintiff was guilty of negligence in the management of the Chickering Place house, in allowing it to be sold without making proper effort to redeem it, and the defendant Pearson is released thereby from any liability on account of his covenant in his deed relating to his lease. 6. The plaintiff did not make sufficient offer for the return of the Chickering Place house to enable him to rescind the sale, and cannot maintain the bill. 7. The insertion of $13,000 as the consideration is not evidence of the actual consideration, and is not evidence in itself from which the jury have a right to infer fraud. 8. The fact that the plaintiff had completed his bargain with Kiles P. Gleason, and had executed his deed before Pearson made his deed, and before the plaintiff saw Pearson's deed, is evidence that the plaintiff was not induced to trade by the insertion of the consideration of $13,000 in the deed. 9. There is no evidence that the plaintiff was influenced or induced by the consideration named in the deed from Pearson, to make his deed to Kiles P. Gleason. 10. The receipt by the plaintiff of the balance of the sale of the Chickering Place house, without offering to pay the money to Pearson, is a waiver of his claim against him."

The defendants also requested the judge to instruct the jury that the fact that the defendants rested their case and put on no witnesses was no ground for any presumption against them.

The judge refused to give the first, second, third, fourth and fifth prayers for instruction, in the language in which they were asked, but instructed the jury that the interest, knowledge and participation of Pearson, in the alleged fraudulent representations, were for the jury to consider and pass upon, on all the evidence in the case; and the judge instructed the jury fully thereon; and submitted the question of settlement with Pearson to the jury, with full instructions thereon, as also the subject matter contained in the fourth and fifth requests; refused to give the sixth and tenth requests, as not applicable to the issues being tried. The seventh request was given with qualifications; and the eighth and ninth requests were given. The defendants alleged exceptions.

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After the above report was made, the plaintiff died, and his executor was allowed by the court to come in on motion and prosecute. From this order, the defendants appealed.

A. Cottrell, for L. W. Gleason.

A. A. Ranney, for K. P. Gleason.

C. S. Lincoln, for Pearson.

T. H. Sweetser & S. Bancroft, for the plaintiff.

COLT, J. The defendants contend that the motion of the executor that he be allowed to prosecute the suit was improperly allowed, on the ground that the action did not survive at common law or under the provisions of the Gen. Sts. *c.* 127, § 1. But this is not an action to recover damages for a simple fraud practised upon the testator, by which he was induced to part with his property at less than its value. It is a suit to recover in equity specific property, or the avails of specific property, still held by one or more of the defendants, parties to the original fraud, and which was obtained from the plaintiff in the abuse of a trust arising out of an existing confidential relation between him and one of the defendants, as well as damages for the breach of the trust. The liability of a trustee in equity for a breach of duty causing damage is not terminated by the death of the party wronged. The case of *Leggate* v. *Moulton*, 115 Mass. 552, cited by the defendants, was an action at law to recover damages for false representations relating to the pecuniary ability of a third person, whereby the plaintiff was induced to part with real estate. It was held that such an action did not survive under the statute. This case is to be distinguished on the grounds stated, and the executor was here properly admitted to come in and prosecute the suit, and under the recent statute to come in on motion without bringing a bill of revivor. St. 1865, *c.* 42. *Pingree* v. *Coffin*, 12 Gray, 288, 317. *Sears* v. *Carrier*, 4 Allen, 339. *Walsham* v. *Stainton*, 1 De G., J. & S. 678.

It remains to dispose of the defendants' exceptions taken to the competency and sufficiency of the plaintiff's evidence. The defendants produced no evidence. In the opinion of the court, the evidence of the plaintiff, considering the nature of the facts to be proved, was sufficient to warrant the findings of the jury upon all the issues necessary to support a decree in his favor. As to the participation of the two Gleasons in the false repre-

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sentations made to the plaintiff, and in the fraud by which one of them, while employed to sell a valuable estate for the plaintiff, was to share in the profits or proceeds of the sale to the other, there was proof of previous arrangements, private consultations, and an actual division of the proceeds of the transaction.

As to the participation of the defendant Pearson in the same fraud, there was evidence that he was present when the deed was passed; that he inserted a false consideration for his deed according to the valuation fixed by his agent, Gleason, for the purpose of the trade with the plaintiff; that he divided the profits with the other defendants; and, above all, that Gleason was acting as agent for him in disposing of the Chickering Place estate, for whose fraud, perpetrated while employed in the work of his agency, he, as principal, was legally responsible. *Commonwealth* v. *Mason*, 105 Mass. 163, 169.

As to the false representations employed, the evidence was, that Gleason, while occupying a fiduciary relation towards the plaintiff as agent to sell, which required him to exercise the highest good faith to secure the best terms for his employer, and while enjoying the confidence of the plaintiff incident to that relation, fraudulently misrepresented the value and annual rental of the Chickering Place estate, the character of the house and of the neighborhood, the fact that a responsible party was in want of the place for a hotel, and that the adjoining house was a boarding-house, and further that the plaintiff trusted these representations, and was induced to part with his estate in exchange for the estate described.

The defendants contend that the representations proved did not constitute a fraud nor warrant the submission of the question to the jury, because they were expressions of opinion and estimate only; and they cite the late case of *Parker* v. *Moulton*, 114 Mass. 99, with others of the same class, which were all cases of affirmations made between buyer and seller respecting the real estate of which the defendant was the seller. As between such parties, statements which concern the value of the land, or its condition or adaptation to particular uses, which are only matters of opinion and estimate, are not actionable. The maxim *caveat emptor* applies. The buyer is not excused from examina-

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tion for himself unless he be fraudulently induced to forbear inquiries which he would otherwise have made. The parties to the transaction are put on their guard; there is no breach of confidence, no abuse of an express or implied trust between them. The cases cited have no application to a suit in equity brought to enforce a trust. They do not show that such representations, made by an agent to his principal, under the circumstances here disclosed, must not be treated as an actionable wrong in a court of equity. It is said, indeed, that where this relation exists, and there is any misrepresentation or concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and as far as possible restore the parties to their original rights. *Emery* v. *Parrott*, 107 Mass. 95. *Ormond* v. *Hutchinson*, 13 Ves. 47, 51. *Beaumont* v. *Boultbee*, 5 Ves. 485. 1 Story Eq. Jur. § 218.

The question whether Pearson had been settled with by the plaintiff for an alleged incumbrance on the land conveyed to him, and whether the evidence warranted the finding, in the view we take of the case, becomes immaterial. The plaintiff cannot rescind the whole contract for the exchange of property. The parties cannot be restored to their former condition, because the plaintiff's original estate has passed into the hands of an innocent party.

The foregoing considerations dispose of part of the objections taken to the evidence admitted at the trial and to most of the specific requests for instructions.

The request for the instruction that there was no ground for presumption against the defendants from the fact that they produced no witnesses, could not be properly given. The neglect of a party to produce evidence which is in his own power, is a fact to be considered by the jury in connection with all the other facts, and in a case of fraud, the parties to which are within reach as witnesses, may be of great weight against him. *Smith* v. *Whitman*, 6 Allen, 562, 564.

The court, we must presume, gave full instructions upon all questions submitted. It does not appear that they were erroneous, or that the instructions requested should have been given, except as they were given in full, or were modified by the judge.

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The evidence objected to nearly all related to the value of the estates which were exchanged. Upon the question of fraud, the actual relative value of the property exchanged had some bearing upon the motives and intentions of the parties. The plaintiff's testimony on this point was admissible. The dealings of Mrs. Charlebois with one of the Gleasons in the purchase of the plaintiff's estate from him, and the payment therefor, were admissible, as showing the value of the property and the relations of the two Gleasons to each other in the transaction. It does not appear that this evidence was objected to because the deeds referred to were not produced. The plaintiff's evidence which was objected to was all admissible on the question of fraud and as showing the accompanying circumstances. So was the lease from Pearson to Graham, which was unexpired at the time of the transaction. *Stebbins* v. *Miller*, 12 Allen, 591, 598.

Decree to be entered for the plaintiff.

On November 8, 1877, the following decree was entered: "The above case having been fully heard by the court, it is ordered, adjudged and decreed that the defendant Kiles P. Gleason do forthwith convey to the plaintiff's representative the mortgage described in the plaintiff's bill as given by the defendant Charlebois to the said K. P. Gleason; also any and all other mortgages held by him upon the real estate described in said bill, and conveyed by said Cheney to the said K. P. Gleason; also the promissory notes or other evidences of indebtedness which said mortgage or mortgages secure. And it is further ordered, adjudged and decreed that the case shall then be referred to Theodore C. Hurd, as master, who shall ascertain the amount of damages suffered by the plaintiff, after deducting the value of the mortgage or mortgages assigned by the said K. P. Gleason to the plaintiff, in accordance with this decree. And it is decreed that the defendants, Loring W. Gleason, Kiles P. Gleason and Henry Pearson, shall pay to the plaintiff the amount of damages so ascertained, together with the costs of suit to be taxed by said master."

On November 12, 1877, the defendants Kiles P. Gleason and Pearson appealed from this decree.

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The master, notwithstanding the appeal, proceeded to hear the parties, and on December 12, 1877, made the following report:

"I find that the mortgages and notes which the defendant K. P. Gleason was directed, by the decree, to convey to the plaintiff's representatives, have not been so conveyed. I find the value of the estate in Reading, at the date of the conveyance alleged in the bill, to wit, October, 1871, to be $7000. I find that the defendants caused to be paid to the plaintiff the sum of $85 as the balance of proceeds of a mortgagee's sale of the estate in Boston, named in the bill.

"The defendant L. W. Gleason testified that he collected, for the plaintiff, the sum of $637, as rents of the Boston estate, and claimed to be entitled to have this sum deducted in estimating the damages. It appears that the defendant L. W. Gleason, from this sum, paid $225, as interest on the mortgages on the Boston estate, and retained the sum of $250 as his commission as a broker, for effecting the sale of the Reading estate. I disallow his claim to have these sums deducted, the case having found the whole of the transactions of sale fraudulent, and established his connection therewith. I find that he paid the plaintiff the balance of $637, to wit, $162.

"I ascertain the plaintiff's damages as follows:

"Value of Reading estate,		$7000.00
"Deduct amount received by the plaintiff,		
"Received from sale of Boston estate,	$85.00	
" " rents " "	162.00	247.00
		6753.00
"Interest on said sum from July 16, 1872,		2185.71
		$8938.71"

The master also reported the objections taken by the defendants, at the hearing before him, and their exceptions, as follows:

"The defendants contended that the hearing should not proceed before the master pending their appeals from the decree of November 8, 1877. Against their objections, the hearing proceeded, the defendants excepting thereto.

"The plaintiff offered in evidence the deed of Pearson to Cheney, of the estate on Chickering Place, Boston. Against

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the objection of the defendant K. P. Gleason, I admitted the deed, not for the purpose of showing the value of the Chickering Place property, but for the purpose of showing the consideration of the conveyance. To the admission of this deed the defendant K. P. Gleason excepted.

"The defendant Pearson offered evidence of the value of the Chickering Place estate in 1871. I refused to admit any evidence of the value of the Chickering Place estate, as the verdict, upon the issues submitted, and the decree had rendered it incompetent and immaterial. To this refusal the defendant Pearson excepted.

"The defendant K. P. Gleason testified that the Reading estate was worth less than $4000. After his cross-examination, upon the consideration of the conveyance of said estate by him to the defendant Charlebois, the plaintiff offered the record of the deed from K. P. Gleason to Charlebois. I admitted this record against his objection and exception.

"The defendant Pearson offered to prove that a watch worth $75 was given by him to the plaintiff Cheney, and contended that its value should be deducted and allowed in the assessment of damages. I ruled that the defendant Pearson was concluded by his answer, that this watch was given to Cheney as compensation for a lease which existed as an incumbrance on the Chickering Place property. To this refusal the defendant Pearson excepted."

The defendants Kiles P. Gleason and Pearson filed exceptions to the master's report substantially as above stated by the master, except the fifth exception of Kiles P. Gleason, which was as follows: "Because the master has not allowed for and deducted the value of the watch referred to in the report, as he was bound to do upon the facts found by him."

Hearing before *Endicott*, J., who overruled the defendants' exceptions, and, at the request of the defendants, reported the same for the consideration of the full court, to be heard with the appeal. If the court should be of opinion that the decree dated November 8, 1877, should be affirmed, and that the exceptions were properly overruled, a decree was to be entered for the plaintiff in the amount found by the master; otherwise, the case was to take such direction as the court might order.

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A. A. Ranney, for K. P. Gleason.

C. S. Lincoln, for Pearson.

T. H. Sweetser, (*S. Bancroft* with him,) for the plaintiff.

MORTON, J. The appeal from the decree of November 8, 1877, does not open any questions upon the merits of the case. *Stanley* v. *Stark*, 115 Mass. 259. All such questions were heard and adjudicated at the former hearing. The decree in its substantial parts clearly follows the frame of the bill and is justified by the record. The only valid objection to it is found in the provision that the costs of suit are to be taxed by the master. This is an error, probably inadvertently committed by counsel in drawing the decree, and overlooked by the court, which may be corrected in the final decree.

After the decree was entered, the master proceeded to hear the parties upon the question of damages, and the defendants took several exceptions to his report.

1. The defendants contend that the master had no right to proceed, during the pendency of their appeal, on the ground that by the appeal all proceedings under the decree were to be stayed, under the Gen. Sts. *c.* 113, § 8. But we are of opinion that the decree was not a final decree, so that the appeal suspended the right of the court and the master to proceed to ascertain the damages sustained by the plaintiff. The decree does not determine the whole case. It contemplates that there is to be further action by the court through the master, and that another and final decree may be necessary in order to give the plaintiff the entire benefit of the decision. *Gerrish* v. *Black*, 109 Mass. 474. *Forbes* v. *Tuckerman*, 115 Mass. 115. The spirit and purpose of the decree was, that the hearing upon the question of damages should proceed at once, and the pendency of the appeal presented no obstacle to a full and fair hearing which would fix the amount of damages and thus render the case ready for a final decree upon the determination of the appeal. The defendants declined to produce and exhibit to the master the mortgages which they were required by the decree to assign, and he could not therefore follow the letter of the rule of reference and "ascertain the amount of damages suffered by the plaintiff, after deducting the value of the mortgage or mortgages assigned by the said K. P. Gleason to the plaintiff;" but he proceeded to

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ascertain the value of the estate in Reading. The defendants were not injured by this proceeding. The value of the estate in Reading is the fundamental element of the damages in any aspect of the case. The parties had a full opportunity to be heard, and to set aside the report would be to observe mere technicalities at the expense of substantial justice. We are therefore of opinion that this exception should be overruled, and that the report should stand as the basis of the final decree to be entered in the case.

2. The exception to the admission of the deed of the Chickering Place estate cannot be sustained. It was the deed of one of the defendants, and tended to show the value which the parties placed upon the Reading estate. Though probably of very little weight, it was competent.

3. The evidence offered by the defendant Pearson, of the value of the Chickering Place estate, was rightly rejected. The record shows that this estate was sold under a mortgage, and that the plaintiff received eighty-five dollars therefrom, which the master has credited to the defendants in his report. The value of the estate was immaterial and incompetent.

4. The deed of the Reading estate, given by K. P. Gleason to Charlebois, had some tendency to show the value which he put upon the estate, and was therefore competent.

5. We are of opinion that the fifth exception of the defendant K. P. Gleason should be sustained. The watch transferred by the defendant Pearson to the plaintiff was property which the plaintiff received on account of the Chickering estate, and, like the rents received, diminishes the loss sustained by him.

The result is, that all the exceptions to the master's report are overruled except the fifth exception, which is sustained; but it is not necessary that, on this account, the case should be recommitted to the master, if the plaintiff will remit from the amount found by the master seventy-five dollars, being the value of the watch as claimed by the defendants.

Upon his so doing, a decree may be entered, the form and details to be settled before a single justice, affirming the former decree with the modifications above suggested, and with the further modification that if the mortgage or mortgages named in the former decree are not assigned to him within ten days, he

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may at his election take a decree and execution against the defendants for the full amount due him, or may apply to the court for further decrees necessary to protect his rights.

Decree accordingly.

GEORGE A. SAWYER *vs.* STATE BOARD OF HEALTH.

Middlesex. Jan. 17. — May 4, 1877. MORTON, ENDICOTT & SOULE, JJ., absent.
Jan. 15. — July 29, 1878. ENDICOTT & SOULE, JJ., absent.

A person aggrieved by an order of the state board of health, under the St. of 1871, c. 167, § 2, prohibiting his carrying on a certain trade, and adjudging it to be a nuisance, has a right of appeal to a jury, although such right is not expressly given by this statute.

A petition for a jury, to "either alter or annul in full" an order of the state board of health, alleged that the petitioner carried on the business of slaughtering, and set forth the order, which directed the discontinuance of the business of "slaughtering and rendering." The jury returned a verdict that they did not affirm the order in full, and made certain "special findings" that the "jury alter the order" by permitting the continuance of the business of "slaughtering" under certain restrictions enumerated, both the verdict and findings being signed by the foreman and affirmed in court. *Held*, that the verdict and findings were sufficiently clear and formal.

Under the Gen. Sts. c. 26, § 5, providing that a board of health "shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth and causes of sickness," a jury, on appeal from an order of the state board of health prohibiting the business of "slaughtering and rendering" on certain premises, may alter the order by permitting the business of "slaughtering" under restrictions that the cellar under the slaughter-house be concreted in concave form, that no swine be kept in or under the slaughter-house, that all offal and offensive matter be removed from the premises before a certain hour of the day of killing, in covered, water-tight boxes or tanks, and that the premises be kept at all times in a condition of neatness and cleanliness acceptable to the local board of health.

PETITION, filed May 12, 1876, to the Superior Court, alleging that on April 3, 1876, the petitioner was, and for seven years before had been, a butcher, and lawfully engaged in the business of slaughtering cattle and sheep on premises occupied by him in Watertown; that this business was not at any time a nuisance, or hurtful to the inhabitants of Watertown, or dangerous to the public health, and the exercise thereof was not at any time at-

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tended by noisome or injurious odors, and was not at any time otherwise injurious to the estates of the inhabitants of Watertown, or contrary to public comfort and convenience; that the state board of health, on said April 3, prohibited the exercise of the petitioner's trade and business on and after May 15, 1876, and caused to be served upon him, on April 14, 1876, a copy of their order of prohibition, as follows:

"Commonwealth of Massachusetts. State Board of Health. Boston, April 5, 1876. To George A. Sawyer, of the town of Watertown, in the county of Middlesex: You are hereby notified that at a meeting of the state board of health, held at Boston, in the county of Suffolk, on the third day of April, 1876, it was ordered, on the petition of W. H. Ingraham and four others, and after a hearing of the parties, that George A. Sawyer, of Watertown, be and he hereby is directed to discontinue the business of slaughtering and rendering on the premises now occupied by him, on and after the fifteenth day of May, 1876. And it is adjudged and determined by this board, that the premises are noxious and offensive, and that the public health and the public comfort and convenience require that the said George A. Sawyer be ordered, as aforesaid, to cease and desist from carrying on the said business on the said premises, on and after the fifteenth day of May, 1876. And you are hereby directed to comply in all respects with the requirements of the said order, under penalty of what may follow thereon."

The petitioner further alleged that he thereupon obeyed said order, and thenceforth desisted and refrained from the carrying on of his trade of butcher, and of slaughtering cattle and sheep, on the premises; and that "said order of prohibition was and is illegal and unjust, and that he is aggrieved thereby, and appeals hereby therefrom, and applies to the Superior Court, now in session in said county of Middlesex, for a jury to hear, pass upon and determine the questions determined by said state board of health in the premises, in issuing and serving said order of prohibition upon him, and that the jury may either alter or annul in full said order of prohibition, and that he may recover his just damages caused to him by service of said order of prohibition as aforesaid, and costs; and that the court may issue such order of notice in the premises to those who should be made respondents, as to said court shall seem meet."

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On this petition, an order of notice was issued to the state board of health and the selectmen of Watertown. The board of health appeared, and filed a motion to dismiss the petition, for want of jurisdiction. The court sustained the motion, and ordered judgment for the respondent; and the petitioner appealed to this court.

G. A. Somerby & E. W. Washburne, for the petitioner.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the respondent. 1. There are no words in the St. of 1871, *c.* 167, or in any other statute, which can be construed to give an appeal.

2. The St. of 1871, *c.* 167, § 2, is constitutional, although no right of appeal to a jury is given. The Legislature might have made provision for an effectual enforcement of the common law, by providing for the appointment of an officer whose duty should be to order the owner of a building to desist from using it for a noxious trade, until it could be ascertained by a jury, on an appeal from that order, whether the use in question created a nuisance or not. *Belcher* v. *Farrar*, 8 Allen, 325. Or the Legislature might have changed the common law in this regard, by prescribing a practical test for determining when a building used for a noxious trade was, and when it was not, a nuisance. Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 53, 95, 96. Wells, J., in *Lowell* v. *Boston*, 111 Mass. 454, 464–467. The St. of 1871, *c.* 167, is an act of the second class; namely, a license law, to the effect that no building, in a city or town containing more than four thousand inhabitants, shall be used for a noxious trade; existing buildings so used are hereby licensed; other buildings may be licensed by the mayor and aldermen or by the selectmen; all licenses may be revoked by the state board of health. This construction of the statute is a reasonable one. The Gen. Sts. *c.* 26, §§ 52–60, provide for an effectual enforcement of the common law in this regard. The St. of 1871, *c.* 167, was designed to accomplish what was not accomplished by that act, and is therefore presumably a change of the common law. The provisions of the act are in substance, though not in form, those of a license law. Prohibiting the use of the building without the written consent of the selectmen, &c., is, in substance, prohibiting its use unless licensed by the selectmen, &c.

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Nightingale, petitioner, 11 Pick. 168. Declaring in a proviso that the terms of the section should not apply to existing buildings is in substance directly licensing those buildings; for a license is not the privilege of doing the act licensed, but is the privilege of being exempt from the operation of a law prohibiting the doing of that act. *Calder* v. *Kurby*, 5 Gray, 597, 598. *Commonwealth* v. *Brennan*, 103 Mass. 70. Gibson, C. J., in *Monongahela Navigation Co.* v. *Coons*, 6 W. & S. 101, 112. *Metropolitan Board* v. *Barrie*, 34 N. Y. 657, 667. From 1836 (if not from 1710) to 1855, and in some cities and towns to 1860, a precisely similar license law was in force. The Rev. Sts. *c.* 21, § 47, authorized the selectmen to revoke any or all assignments, they might have made, of places for the exercise of noxious trades, and such revocations were not subject to be reviewed by a jury. The jury trial provided in § 48 gave the public a remedy by which an assignment could be revoked, in case the selectmen wrongfully omitted to revoke it. The first time that an owner was given an appeal, by which an order revoking the assignment of his place could be reviewed by a jury, was by the St. of 1855, *c.* 391, § 3. That act was originally in force in those cities and towns only which voted to adopt it, and was made obligatory throughout the Commonwealth by the Gen. Sts. *c.* 26. It is clear, therefore, that the Rev. Sts. *c.* 21, § 47, was a license law: if it was not, it was unconstitutional. The Prov. St. of 1710–11, (9 Anne) *c.* 8; 1 Prov. Laws, (State ed.) 656; and the St. of 1785, *c.* 1, must, it is submitted, be construed in the same way. The Rev. Sts. *c.* 21, profess to be nothing more than a reënactment of these statutes. So construed, the St. of 1871, *c.* 167, is constitutional. The Legislature can constitutionally make the action of its delegate, in revoking a license, final and not subject to be reviewed by a jury. A license is an exemption from the operation of a law; consequently, revoking a license is a legislative act; if the Legislature can delegate the power to do that act, it can make the action of the delegate final. The St. of 1875, *c.* 99, § 12, is an example of the action of the delegate being final, where a man is deprived of a beneficial use of his building and fixtures without a trial by jury. So are laws requiring a license where no license was required before. St. 1869, *c.* 415, § 12. Gen. Sts. *c.* 86, § 12. *People* v. *Hawley*, 3 Mich.

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330. So are laws requiring yearly licenses. Sts. 1796, *c.* 88, § 5; 1848, *c.* 270, § 2; 1839, *c.* 53; 1855, *c.* 121; 1845, *c.* 197, § 2; Rev. Sts. *c.* 47, § 1. St. 1832, *c.* 166. *Commonwealth* v. *Blackington*, 24 Pick. 352. The fact that the state board of health can act only after notice and hearing does not show that their action is judicial. The hearing was required to enable them to exercise a healthy discretion; but a legislative, not a judicial discretion. *Crease* v. *Babcock*, 23 Pick. 334, 344.

LORD, J. The only question which has been submitted for a determination in this case is, Has the petitioner, under the statutes of this Commonwealth, a right to a trial by jury upon the question whether the exercise of his business is dangerous to the public health? It is contended by the petitioner that, if the St. of 1871, *c.* 167, applies to his building and trade, and deprives him of the right of appeal to a jury, it is unconstitutional. The respondent, on the other hand, contends that the statute is simply a license law, and can be sustained as a license law, even to the extent of preventing the petitioner from carrying on his business, within the constitutional exercise of legislative authority, although he has no right of trial by jury.

The important question at the outset, therefore, is, Did the Legislature intend that the order of the state board of health, passed under § 2, requiring the petitioner "to cease and desist from carrying on the said business on the said premises, on and after the fifteenth day of May, 1876," should be absolute, final and irrevocable? This statute is to be expounded in view of all existing laws upon the same subject matter, and is, if consistent with proper rules of construction and interpretation, to be so construed as to be in harmony with the provisions of the Constitution of the Commonwealth. If, however, by reasonable construction, the statute cannot be interpreted in such manner as to be consistent with the Constitution, the Constitution must prevail and the statute is void. It is necessary therefore to examine the legislation upon this subject.

The earliest provincial act upon the subject of slaughter-houses is that of 1692–3, (4 W. & M.) *c.* 23, which is as follows: "The selectmen of the towns of Boston, Salem and Charlestown, respectively, or other market towns in the province, with two or more justices of the peace dwelling in the town, or two of the

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next justices in the county, shall, at or before the last day of March, 1693, assign some certain places in each of said towns (where it may be least offensive) for the erecting or setting up of slaughter-houses for the killing of all meat, still-houses and houses for trying of tallow and currying of leather (which houses may be erected of timber, the law referring to building with brick or stone notwithstanding), and shall cause an entry to be made in the town-book of what places shall be by them so assigned, and make known the same by posting it up in some public places of the town; at which houses and places, respectively, and no other, all butchers and slaughtermen, distillers, chandlers and curriers shall exercise and practise their respective trades and mysteries; on pain," &c. 1 Prov. Laws, (State ed.) 59. In passing, we may refer, as bearing upon the question whether the legislation on this subject has been in the nature of license laws, to the Prov. St. of 1692–3, (4 W. & M.) *c.* 20, § 1, in reference to the sale of intoxicating liquors, in these words: "No person or persons whatsoever (other than such as, upon producing certificate from the selectmen of the town where they dwell, or who shall be otherwise thought fit by the justices themselves, shall be licensed by the said justices in quarter sessions) may presume to be a common victualler, innholder, taverner, or seller of wine, beer, cider, or strong liquors by retail; nor shall any presume, without such license, to sell wine or strong liquors privately by a less quantity than a quarter cask, and that delivered and carried away all at one time, on pain of forfeiting," &c. 1 Prov. Laws, 56. And similar license laws have been enacted at various times from that time to the present. There are other provisions to which it is not necessary to refer. The St. of 1692–3 made no provision for prohibiting the business of slaughtering, &c., in places, which had been once assigned for that purpose.

By the St. of 1710–11, (9 Anne) *c.* 8, provision is made upon that subject. The preamble of the act is substantially a recital of the act before quoted, and the first section is a concise reënactment of the same provisions. The second section is as follows: "When and so often, from time to time, as it shall appear any house or place assigned or to be assigned to and for the exercising of either of the aforesaid trades or mysteries, to

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become a nuisance by reason of offensive and ill stenches proceeding from the same, or otherwise hurtful to the neighborhood, it shall and may be lawful, to and for the court of general sessions of the peace within the county, to cause inquiry to be made thereinto by a jury, and to suppress such nuisance by prohibiting and restraining the further use thereof for the exercise of either of the aforesaid trades or mysteries, under a fine," &c. 1 Prov. Laws, 656. From that time till 1871, various changes and reënactments of the law took place, and in every instance, so far as we know, provision was incorporated into the law by which the question whether a place which had been once lawfully established for the exercising such trades should be discontinued by public authority was ultimately to be determined by a jury. The learned counsel for the respondent, in their extremely able and thorough argument, have failed to call our attention to any legislative act vesting the ultimate power of decision in any other tribunal.

Article 15 of the Declaration of Rights is as follows: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it."

These citations are made not for the purpose of showing that the legislative act in question is in violation of the Constitution and therefore void, but, as before intimated, for the purpose of grouping the legislation as it existed at the time of passing the act in order to aid us in the interpretation of it. And, in the same view, it becomes necessary to look into existing laws.

By the Gen. Sts. *c.* 26, the whole power of regulation of noxious and offensive trades is committed to the respective boards of health of the several towns. They may assign places for the exercise of such trades and may revoke such assignments. § 52. The rights of the public and of the individual exercising the trade are carefully secured. If the town board of health refuses to revoke an assignment, after the place shall have become a nuisance, and perhaps without any effort to procure a

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revocation, any person aggrieved may apply to the Superior Court for a revocation of the assignment, and the court may, after a trial, revoke the same. § 53. If the board revokes the assignment, any person aggrieved by the revocation may have an appeal to a jury, who may annul the revocation. §§ 55, 56. The rights of the public are fully secured. Whenever by public authority the assignment is revoked, that revocation is effectual and in force, until the decision is annulled by verdict of a jury. § 57. These provisions of law were all in full force when the St. of 1871 was passed.

It now becomes important to examine the statutes in relation to the state board of health. That board was established by the St. of 1869, *c.* 420. The board was to "take cognizance of the interests of life and health among the citizens of this Commonwealth." They were to "make sanitary investigations and inquiries in respect to the people, the causes of disease, and especially of epidemics and the sources of mortality, and the effects of localities, employments, conditions and circumstances, on the public health;" and "gather such information in respect to those matters as they may deem proper, for diffusion among the people." It was also their duty to "advise the government in regard to the location of any public institutions." They are required also to report to the Legislature "their doings, investigations and discoveries during the year ending December thirty-first, with such suggestions as to legislative action as they may deem necessary." It is made their duty also "to examine into and report, what in their best judgment is the effect of the use of intoxicating liquor, as a beverage, upon the industry, prosperity, happiness, health and lives of the citizens of the state. Also, what additional legislation, if any, is necessary in the premises." This is the whole duty of the board under the act establishing it. No other power or duty was conferred or imposed upon such board until the St. of 1871, *c.* 167, which is the act under consideration. The first section of that act provides, "Whoever, in any city or town containing more than four thousand inhabitants, erects, occupies or uses any building for carrying on therein the business of slaughtering cattle, sheep or other animals, or for melting or rendering establishments, or for other noxious or offensive trades and occupations, or permits or

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allows said trades or occupations to be carried on upon premises owned or occupied by him or them, without first obtaining the written consent and permission of the mayor and aldermen, or selectmen of such city or town, shall forfeit a sum not exceeding two hundred dollars for every month he or they so occupy or use such building or premises, and in like proportion for a longer or shorter time: provided, that the terms of this section shall not apply to any building or premises now occupied or used for the trades or occupations before described." It is agreed that the petitioner's premises are within the proviso, and might be used without such permission. It will be observed also that the use is not authorized by that act; but simply that the terms of the act shall not apply to buildings then actually in use. If therefore the language of the section could be construed as a license, it is not easy to see how it can be a license of that which is in terms excluded from its operation. The precise question to be determined in this case arises under the second section of the act of 1871, which is as follows:

"Whenever, in any city or town containing more than four thousand inhabitants, any building or premises are occupied or used by any person or persons or corporation for carrying on the business of slaughtering cattle, sheep or other animals, or for melting or rendering establishments, or for other noxious or offensive trades, the state board of health may, if in their judgment the public health or the public comfort and convenience shall require, order any person or persons or corporation carrying on said trades or occupations, to desist and cease from further carrying on said trades or occupations in such building or premises; and any person or persons or corporation, continuing to occupy or use such building or premises for carrying on said trades or occupations after being ordered to desist and cease therefrom by said board, shall forfeit a sum not exceeding two hundred dollars for every month he or they continue to occupy and use such building or premises for carrying on said trades or occupations after being ordered to desist and cease therefrom by said board as aforesaid, and in like proportion for a longer or shorter time: provided, that on any application to said board to exercise the powers in this section conferred upon them, a time and place for hearing the parties shall be assigned by said board

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and due notice thereof given to the party against whom the application is made, and the order hereinbefore provided shall only be issued after such notice and hearing."

This section authorizes the state board of health to forbid the exercise of the offensive trade in any municipality of more than four thousand inhabitants. This is its whole power, under that or any other provision of law in respect to the regulation of noxious trades. By the first section of the act, the Legislature have declared their purpose that the general subject of noxious and offensive trades shall be within the control of the boards of health of the municipal corporations. Precisely the same power is given by the Gen. Sts. *c.* 26, § 52, to the boards of health of towns as by this section is given to the state board of health. The only difference is this, that by the St. of 1871, the state board of health is bound to give notice to a party and allow him a hearing before it can pass an order of prohibition; but under the Gen. Sts. *c.* 26, § 52, the selectmen may pass an order of prohibition without any previous notice. *Belcher* v. *Farrar*, 8 Allen, 325.

We cannot suppose that the Legislature intended to change the whole system of regulation of noxious trades by simply conferring the power to prohibit in certain cases upon the state board of health.

If the construction contended for by the respondent is correct, there is nowhere any power of revision of the action of the board. It is absolute, final, conclusive. In cities and towns containing four thousand inhabitants, the whole system, so elaborately prepared and enacted by the Gen. Sts. *c.* 26, by which the rights of the public and the rights of citizens are secured through the intervention of trials by jury in the county and before the Superior Court, is absorbed in the jurisdiction of a state board of health; and this, too, without a suggestion of the repeal of the many provisions of the existing laws which are in conflict with this construction, and with the strong intimation conveyed by the first section, that the general system is to be preserved. It is not necessary to look at the consequences of such an interpretation to induce us to reject it; still those consequences are proper subjects for consideration, and are presumed to have been foreseen by the Legislature. It is undoubtedly true that the

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mayor and aldermen or selectmen may authorize in writing the carrying on of noxious and offensive trades at a certain place in a city or town of more than four thousand inhabitants; and the day after the occupancy commences, the state board of health may give a notice and hearing to the parties thus authorized, and may issue an order forbidding the use of that place. Did the Legislature intend that the town board of health might then again authorize the same business in the same place, to be again prohibited by the state board of health? We can no more suppose that the Legislature intended to introduce this conflict and confusion into the law, than that it intended by implication to subvert the whole system of regulation, by absorption into a general authority of prohibition all over the Commonwealth by a board composed of only seven members, serving without compensation, and necessarily strangers to the great majority of the various municipalities and unacquainted with their local interests.

The only construction which we can give to the statute, consistent with the Constitution of the Commonwealth, with existing laws recognized by the act itself as still in force, with the general policy of the legislation upon the subject, is to treat the power given by the statute as given subject to the same limitations and qualifications as that given to town boards of health upon the same subject, and, of course, with the same right of appeal. This construction of the statute preserves the general system provided by law unimpaired; it simply gives to the state board of health jurisdiction, whether concurrent with the town boards or exclusive it is not material to this case to inquire, in cities and large towns, to do what may be done in every town of the Commonwealth by the local board of health; but we do not think that it was the purpose of the Legislature, nor does the language of the act compel us to say, that its effect is to deprive the party of that right of trial by jury, to which the citizens in such cases have been accustomed for nearly two centuries. By the Gen. Sts. *c.* 26, § 52, "the board" (the town board of health) "may also forbid the exercise of such trade or employment within the limits of the town or in any particular locality thereof." By § 55, the "orders of prohibition under § 52 shall be served upon the occupant or person having charge of the

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premises where such trade or employment is exercised." By § 56, "any person aggrieved by such order may appeal therefrom," &c. Although the whole proceeding is statutory, and not according to the rules of the common law, we think it was the purpose and intention of the Legislature that the decision of the new tribunal should be subject to the same rights of appeal as that of the local board. Many questions present themselves which have not been discussed, which the parties, if they desire, may raise upon the trial, and to which it is not necessary to refer. The result of our whole consideration is, that the Superior Court erred in dismissing the petition, and that it must

Stand for further hearing.

The case was then tried in the Superior Court, and the jury returned the following verdict and special findings, each signed by their foreman and affirmed in court:

"Verdict. The jury affirm the order of the state board of health, in full, dated April 3, 1876. The jury answer, No."

"Special findings. The jury alter the order of the state board of health, dated April 3, 1876, as follows: that Mr. George A. Sawyer shall be permitted to continue the business of slaughtering animals on the premises now occupied by him in the town of Watertown, under the restrictions as per appended sheet.

"1. Mr. George A. Sawyer shall be required to concrete the cellar under his slaughter-house, in concave form.

"2. Mr. Sawyer shall not keep swine in or under his slaughter-house.

"3. All offal and offensive matter shall be removed from the above premises before ten o'clock, P. M., of the day of killing, in covered, water-tight boxes or tanks.

"4. Said premises shall be kept at all times in a condition of neatness and cleanliness acceptable to the local board of health."

The respondent moved to set aside the verdict, for the following reasons:

"1. That the verdict does not determine, pass upon, or in any wise relate to certain matters embraced in and prohibited by the order of the defendants appealed from, to wit, the business of rendering.

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"2. That the verdict neither affirms, annuls or alters said order in substantial particulars, to wit, as to the business of rendering.

"3. That the verdict is indefinite and uncertain, and does not prescribe in what condition the premises shall be kept so that such condition can be determined from the verdict.

"4. That the verdict delegates to another tribunal authority in the premises and power to enlarge or limit the finding of the jury and the order appealed from.

"5. That the fourth restriction contained in the verdict is void, and vitiates the verdict.

"6. That the verdict is partial, incomplete, and does not cover the subject matter of the order appealed from."

The motion was overruled; and the respondent appealed to this court.

C. R. Train, Attorney General, *& J. B. Goodrich*, for the respondent.

G. A. Somerby, (*E. W. Washburne* with him,) for the petitioner.

LORD, J. When this petition was before us at a former term, it was decided that the petitioner had the same right of appeal from an order of the state board of health as from that of the local board.

The statutes of the Commonwealth do not in terms authorize either the local or state board of health to prescribe regulations for the mode of carrying on noxious or harmful trades or business. Their power is that of prohibition. Gen. Sts. *c.* 26, § 52. Although no authority is given to regulate "offensive trades," yet by § 5 of the same chapter it is provided that "the board shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth, and causes of sickness, within its town," &c. By § 56, any person aggrieved by the order of prohibition may appeal therefrom, and provision is made for a speedy hearing before a jury. Section 58 provides that "the verdict of the jury, which may either alter the order, or affirm or annul it in full, shall be returned to the court for acceptance as in the case of highways; and said verdict, when accepted, shall have the authority and effect of an original order from which no appeal had been taken."

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In view of these provisions of the statute, we do not deem it necessary to determine the question whether the power of prohibition includes that of regulation, for we think, taking all the legislation upon the subject in view, that the statute confers upon the boards of health the power to regulate the mode in which "offensive trades" shall be carried on.

The order of the state board of health appealed from is "that George A. Sawyer of Watertown be and he hereby is directed to discontinue the business of slaughtering and rendering on the premises now occupied by him, on and after the fifteenth day of May, 1876."

It is to be observed that the business of "slaughtering" and the business of "rendering" are not the same business. They are carried on sometimes conjunctively, and sometimes separately. They are not equally offensive; and, when carried on in the same establishment, they are undoubtedly more offensive than when either is carried on without the other; and whether the prohibition of the state board of health is confined to the carrying on of both kinds of business in connection, or whether it is an order prohibiting each, is unimportant. No criticism of the order is made in this respect. The petitioner accepts it as a prohibition of each business, and that is as favorable a view as can be taken for the validity of the order. Nor does the petitioner claim to carry on the business of rendering, nor does he seek for any modification of the order in this respect. His appeal relates only to the order forbidding his carrying on the business of slaughtering. That subject only was presented to the consideration of the jury. Under the statute above cited, the jury have authority to affirm the order in full. Although with slight informality, yet with no possibility of error, the jury find that they do not affirm the order in full. The same section of the statute provides that the jury may alter the order. And, upon this branch of the case, the jury make "special findings," commencing their special findings thus: "The jury alter the order of the state board of health, dated April 3, 1876, as follows: that Mr. George A. Sawyer shall be permitted to continue the business of slaughtering animals on the premises now occupied by him in the town of Watertown, under the restrictions as per appended sheet." The restrictions, four in number, as well as

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the general finding that the order is not affirmed, are signed by the foreman of the jury, and both appear to have been affirmed in court.

It would undoubtedly have been within the power of the court, before the verdict was affirmed, to have had all the findings of the jury incorporated into a single one in the form of an order framed substantially as if ordered by the state board of health; and that, perhaps, would have been the preferable mode of affirming the verdict. We do not, however, think the mode adopted so defective in form as to require us therefore to set it aside. The record shows that the petitioner set forth in his petition the order of the state board of health, in the terms in which it was made, and prayed that a jury might either alter or annul in full such order of prohibition. The several findings of the jury appear also upon the record, and, upon the principle that that is certain which can be made certain, we think the several findings of the jury may be so applied to and incorporated with the original order, that the whole is sufficiently clear, precise and definite, in matter of form.

There remains, then, only the question whether in substance the findings of the jury are warranted; and it seems to us the proper test of this is, Is the order, as modified by the jury, one which the state board of health is authorized to make? And we think it is. As already suggested, we think either the local or the state board of health, under the general authority given them to "make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth," &c., may properly make regulations as to the mode of conducting offensive trades. It may be that such regulations must be enforced, if not obeyed, by absolute prohibition; and it may be that the order making them would of itself be an order of prohibition to the conducting of them in any other mode.

The law prescribes no standard by which the propriety of such regulations must be judged. It rests only in the sound judgment and discretion of public officers appointed because of their qualifications for such duty, but subject to the revision of a jury; and the restrictions and limitations imposed by a jury must be of an extraordinary character for the court to interfere and say that, in law, they are not authorized. On examining

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these limitations, we cannot see that they are subject to objection.

The first is, "that the petitioner shall be required to concrete the cellar under the slaughter-house in concave form." There can be no doubt or misunderstanding of the meaning of this language. And the court cannot say that it is not a proper and a reasonable requirement. The second is, "Mr. Sawyer shall not keep swine in or under his slaughter-house." Certainly, no objection can be made to this. The third is, "All offal and offensive matter shall be removed from the above premises before ten o'clock, P. M., of the day of killing, in covered water-tight boxes or tanks." Nor is there in this anything objectionable. Of course, the true construction of "removal" is effectual removal from the premises.

The fourth and only remaining restriction is, that "said premises shall be kept at all times in a condition of neatness and cleanliness acceptable to the local board of health." We do not understand this finding as an imposition of any duty upon the local board of health. There is probably nothing in it which would not be implied by law if it were omitted. It is a simple declaration that there shall not be allowed any accumulation of filth from any source or by any means, by which the premises should become a nuisance; and the reference to the local board of health is probably as to the legal standard of neatness; but, whatever may be its construction, we do not see that it in any manner vitiates the finding of the jury; for if, when the petitioner has complied with all the regulations of the order, as altered by the jury, he, by some extraneous means, accumulates filth upon his premises, in such manner as to injuriously affect the public health, and in some other mode creates a nuisance, the law would subject him to the control of the local board of health, as well as to that of the state board.

There is a peculiarity in this proceeding which quite distinguishes it from the ordinary rules which govern appeals. The appeal to a jury does not vacate the order. It remains in full force till annulled or altered. If not annulled or altered, it still stands; if altered, it stands as altered. If the alterations made are absolutely impracticable, the order still stands just as if the original order had been made in the terms of the order as altered

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by the jury; and if the original order had contained the same regulations, we certainly could not say, as matter of law, that the order was void. At any rate, we could not say that it was void so far as the restrictions which it was competent for the board of health to make were concerned, whatever may be said as to any restriction which it was not within their power to make; and whatever the board of health may do, the jury may do, and with the same effect. *Judgment affirmed.*

CHARLES N. PHILLIPS *vs.* THOMAS FADDEN.

Norfolk. January 22. — July 18, 1878.

An officer who arrests a person, without a warrant, under the St. of 1876, *c.* 17, on the ground that he is "found in a state of intoxication," is liable to an action for an assault and false imprisonment, if he omits to make a complaint against him for the crime of drunkenness; or if the person arrested is not in fact intoxicated, although the officer acts in good faith, and under a reasonable belief that the person is intoxicated.

In an action against an officer, who arrested the plaintiff, without a warrant, under the St. 1876, *c.* 17, there was evidence that while the officer was taking the plaintiff to the lock-up, the plaintiff asked to be let off, and promised the officer that if he would release him, he would go home peaceably; that the officer released him and did not afterwards make a complaint against him. There was also evidence that when the plaintiff was released, the officer told him to be at court the next day; and that the officer then applied for a warrant, but did not obtain one. The judge instructed the jury that, to release the officer from liability, the jury must be satisfied that it was understood and agreed between the parties at the time that no further proceedings were to be taken. *Held*, that the defendant had no ground of exception.

TORT for assault and battery and false imprisonment, at Holbrook, on July 12, 1877. Writ dated September 6, 1877. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was arrested without a warrant on the day alleged, by the defendant, a constable of the town of Holbrook, in a public place in that town. The evidence was conflicting upon the question whether the plaintiff was or was not intoxicated at the time of his arrest.

There was evidence tending to show that after the arrest was made, and while the officer was taking the plaintiff to the

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lock-up, the plaintiff asked to be let off, and promised the defendant that, if he would release him, he would go to his home peaceably, and would not drink any more; and that the defendant consented and suffered him to go at large, and did not, in fact, afterwards take him into custody upon this charge, or make a complaint against him, or carry him before the court. There was also evidence tending to show that the defendant, when he released the plaintiff, told him to be on hand to go to court the next morning; that the defendant went to the clerk of the district court, who lived in an adjoining town, for a warrant, but was told by the clerk that he had no blank warrants with him, and came away without procuring a warrant; and that he did not take any further steps in the matter.

The defendant requested the judge to instruct the jury, that an officer who had, without a warrant, arrested a person for being intoxicated in a public place, might afterwards release him without taking him before the proper court, if, in the exercise of his judgment, that was the best course to be pursued; and that he would not be liable for so doing to the party arrested, unless it appeared that he acted in bad faith in making the arrest.

The judge declined to give this instruction; and instructed the jury as follows: "An officer who, without a warrant, arrests a person for being intoxicated, does so at his peril; and if it afterwards appears that the person so arrested was not in fact intoxicated, within the meaning of the statute, at the time of the arrest, the officer is liable in trespass, notwithstanding he made the arrest in good faith, and under a reasonable belief that the person arrested was intoxicated.

"After an officer has, without a warrant, once arrested a person for being intoxicated in a public place, he is bound to carry him before the proper court; and if he fails to do so, he is liable, unless it is shown that the person arrested requested or consented to the discharge; and in order to release the officer from liability upon this ground, the jury must be satisfied that it was understood and agreed between the parties at the time that no further proceedings were to be taken in the matter."

The jury returned a verdict for the plaintiff in the sum of $50; and the defendant alleged exceptions.

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A. French, for the defendant.

J. F. Kilton, for the plaintiff.

AMES, J. It was provided by the St. of 1869, *c.* 415, § 42, that "if a person is found in a state of intoxication in a public place, or is found in any place in a state of intoxication committing a breach of the peace or disturbing others by noise, any sheriff, deputy sheriff, constable, watchman or police officer shall without a warrant take him into custody, and detain him in some proper place until, in the opinion of such officer, he is so far recovered from his intoxication as to render it proper to carry him before a court of justice. The officer shall then take him before some justice," &c., "and shall make a complaint against him for the crime of drunkenness." It will be observed that the terms of this statute left nothing to the discretion of the officer, but made it his imperative duty to arrest the offender and afterwards to institute proceedings to have him brought to trial for his offence as soon as he was in a condition to be tried. In the case of *Brock* v. *Stimson*, 108 Mass. 520, it was decided that an arrest under this provision of the statute was only authorized as preliminary to a complaint and judicial proceeding, and that the officer making such arrest was liable to an action for assault and false imprisonment if he omitted to take the party arrested before the proper tribunal and to complain against him for the crime of drunkenness.

By the St. of 1875, *c.* 99, the statute above cited was repealed, and a new system for the regulation of the sale of intoxicating liquors was established. In this new system, no provision was made for the summary arrest, without a warrant, of persons found in a state of intoxication in a public place or committing a breach of the peace or disturbing others by noise. But early in the next session the Legislature supplied this omission by a statute in these words: "Whoever is found in a state of intoxication in a public place, or is found in any place in a state of intoxication committing a breach of the peace or disturbing others by noise, may be apprehended by any sheriff, deputy sheriff, constable, watchman or police officer, without a warrant, and kept in custody in some suitable place until he is so far recovered from his intoxication as to render it proper to carry him before a court of justice. The officer may then make a

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complaint against him for the crime of drunkenness." St. 1876, *c.* 17.

It will be observed that this last statute differs in some material respects from the law upon the same subject in force at the time when the case of *Brock* v. *Stimson*, above cited, was decided. The language of the new statute is permissive rather than imperative. It provides that the offender may be apprehended, and that when he has recovered from his intoxication the officer may make a complaint against him for the crime of drunkenness. But this change in the law from "shall" to "may," although it undoubtedly leaves it to the sound judgment and discretion of the officer to decide whether the case requires the arrest of the offender, was not intended to change the purpose of the arrest when made. The words "shall" and "may" are not unfrequently equivalent terms. *Worcester* v. *Schlesinger*, 16 Gray, 166. The statute evidently is based upon the assumption that when a man is found in a state of intoxication in a public place, there may be such danger of a breach of the peace, or at least of disturbance and annoyance, as to render it proper that the offender should be taken into custody. In such case, the officer may act without waiting for a warrant. We cannot suppose that it was intended to give the officer any power which he would not have, if he had a warrant. When the Legislature provides for an arrest by a peace-officer, we must understand that the arrest intended is such as is incident to the service of legal process. The custody is to be temporary only, to continue until the party arrested is in a condition proper for his appearance in court. The provision, that the officer may then make a complaint for the crime of drunkenness, only means that he need not make the complaint until then. The construction contended for by the defendant would make the officer a sort of guardian for the offender, with absolute discretion to decide not only as to the necessity of a summary arrest, but also as to the duration of the imprisonment after the arrest. It is hardly to be supposed that a discretion so wide and so liable to abuse was intended to be conferred upon him.

We must hold therefore that the change in the statute does not take the case out of the rule as given in the case of *Brock* v. *Stimson*, above cited. Every man has the right to the enjoy-

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ment of his liberty, except so far as restrained by law. One who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, or to do what the law required him to do in making the arrest, his whole justification fails.

If the person arrested was not in fact intoxicated, the statute gave the officer no right to arrest, even though, in so doing, he acted in good faith and upon reasonable grounds of belief. The case of *Rohan* v. *Sawin*, 5 Cush. 281, was a case in which the arrest was for a supposed felony, and the rule of the common law which governed that case does not apply to this, which depends upon the words of the statute.

As to so much of the instructions to the jury as relates to the effect of any agreement or understanding between the officer and the person arrested, we are not called upon to say anything more than that the defendant has no ground of complaint.

Exceptions overruled.

COMMONWEALTH *vs.* L. H. CHASE.

Suffolk. June 25. — July 2, 1878. COLT & SOULE, JJ., absent.

An indictment under the Gen. Sts. *c.* 166, § 3, which charges the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery," does not sufficiently describe the substance alleged to have been adulterated, and, if seasonably objected to for that cause, must be quashed.

INDICTMENT on the Gen. Sts. *c.* 166, § 3, alleging that the defendant on April 4, 1877, at Boston, "unlawfully and fraudulently did adulterate a certain substance intended for food, to wit, one pound of confectionery, with a certain substance injurious to health, to wit, with a certain substance called chromate of lead, with the intent of him, said Chase, and for the purpose then and there of selling for food said confectionery so adulterated as aforesaid, he said Chase then and there well knowing said chromate of lead to be injurious to health as aforesaid."

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In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, because "the offence is not sufficiently set out in the indictment, the word 'confectionery' being a general term, and not sufficiently specific in not stating the kind of confectionery to enable the defendant to meet the case that might be proved under so general a term as that of the word 'confectionery.'" *Gardner*, J., overruled the motion, and the defendant was tried and found guilty, and alleged exceptions.

T. Weston, Jr., for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

GRAY, C. J. The word "confectionery" is a generic word, which includes a great variety of kinds of articles usually sold in a confectioner's shop, and does not describe the substance, which the defendant is charged with adulterating, with the precision and certainty that the Constitution of the Commonwealth and the rules of criminal pleading require. Declaration of Rights, art. 12. *Commonwealth* v. *Maxwell*, 2 Pick. 139, 143. *State* v. *Morey*, 2 Wis. 494. *Rex* v. *Chalkley*, Russ. & Ry. 258. Archb. Crim. Pl. (18th ed.) 63. The objection, having been duly taken by motion to quash before the jury were empanelled, is rightly before us on the bill of exceptions. St. 1864, *c.* 250, § 2. *Commonwealth* v. *McGovern*, 10 Allen, 193. The exceptions must therefore be sustained and the *Indictment quashed.*

COMMONWEALTH *vs.* CORNELIUS TOBIN.

Suffolk. June 25, 29. — July 18, 1878.

In a case of felony, the verdict must be pronounced by the foreman in open court; and it is not sufficient for the foreman to hand a written verdict to the clerk, and for the latter to read it to the jury, and to tell them to hearken to their verdict as the court has recorded it.

If a verdict is improperly rendered in a criminal case, and, for this reason, a motion for a new trial is filed the same day, the order of the court overruling this motion is a decision upon a question of law, which may be brought to this court by a bill of exceptions, under the Gen. Sts. *c.* 115, § 7.

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INDICTMENT for manslaughter. After verdict of guilty in the Superior Court, the defendant, on the same day, moved to set aside the verdict for the following reasons: "1. Because the proceedings in regard to the rendition of the verdict and separation of the jury were irregular and illegal. 2. Because no proper and correct verdict was rendered by the jury. 3. Because, after the case was given to the jury, and before any verdict was rendered, they had separated without the knowledge or consent of the defendant."

The motion was overruled by *Gardner*, J., who allowed a bill of exceptions, stating the facts that appeared upon the hearing of the motion, as follows:

The jury retired to consider their verdict during the morning session of the court, and at the time of the adjournment of the court in the afternoon they had not agreed. The judge adjourned the court, and, when on his way from the bench to the lobby and within two minutes after the formal adjournment of the court, instructed the officer in charge of the jury, without the knowledge or consent of the defendant or his counsel, that if the jury agreed before the coming in of the court, on the following morning, he might permit them to seal up their verdict, separate, and return with their verdict into court at the opening thereof in the morning. The jury thereafter, and about six o'clock that evening, agreed upon a verdict of guilty, which the foreman wrote into a printed blank, signed and sealed up with the other papers in the case, in the presence of all the jury. The foreman then informed the officer that the jury had agreed. The officer asked if they had sealed up their verdict, to which the foreman answered, "Yes." The officer then said, "You may separate, and return into court tomorrow morning at half-past nine o'clock." The jury separated, the foreman taking the sealed verdict with him.

At the opening of the court the next morning, all the members of the jury, the defendant and one of his counsel were present in court. The clerk was directed by the court to take the verdict. The clerk called the defendant by name. The clerk then said, "Gentlemen of the jury, have you agreed upon your verdict?" The foreman answered, "We have," and handed, by the officer, a sealed envelope to the clerk. The clerk broke the

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seal, and took therefrom and read to the jury the paper which is copied in the margin,* and which was all printed, except the word "guilty" and the signature, which were written by the foreman. The clerk then said: "Gentlemen of the jury, hearken to your verdict as the court has recorded it. You, upon your oaths, do say that the prisoner at the bar is guilty. So you say, Mr. Foreman, and so, gentlemen, you all say."

The above is all that was said. The foreman, after he had sealed the verdict as above stated, kept the same in his possession until he delivered it to the clerk, when the verdict was returned, and he testified that it had not been opened. The defendant and his counsel knew that the jury had separated after the adjournment of the court; but, as to all the other above facts, they were ignorant.

The case was argued at the bar, and was afterward submitted on additional briefs to all the judges.

T. Riley & C. T. Russell, Jr., for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

GRAY, C. J. By the law of England, in cases of felony, the only verdict allowed was a public verdict pronounced by the foreman in open court, and in the presence of the prisoner. In prosecutions for misdemeanors, and in civil cases, although the jury were permitted to separate upon giving a privy verdict orally to the judge out of court, yet such verdict was of no force unless afterwards affirmed by an oral verdict given publicly in court, and the only effectual and legal verdict was the public

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* Commonwealth of Massachusetts.

Suffolk, ss.

Superior Court for the Transaction of Criminal Business.

March Term, 1878.

Commonwealth *vs.* Cornelius Tobin.

In the above entitled case, the jury say, that the defendant is *guilty*, and this is their verdict. (Signed:) *John Salmon*, Foreman.

INSTRUCTIONS BY THE COURT.

The above blank may be filled with the word 'Guilty,' or the words 'Not guilty,' as the jury may find the defendant to be one or the other. It is then to be *signed* by the foreman and *sealed up* in an envelope with the other papers in the case, *before* the jury separate.

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verdict. 3 Bl. Com. 377. 4 Bl. Com. 360. 1 Chit. Crim. Law, 635, 636.

In this country, by way of substitute for a privy verdict, and to attain the same end of allowing the jury to separate after they have come to an agreement, a practice has been adopted in civil actions, and in cases of misdemeanors, at least, if not of all but capital crimes, of directing the jury, if they should agree during the adjournment of the court, to sign and seal up their finding, and come in and affirm it at the next opening of the court; but the verdict which determines the rights of the parties, and is admitted of record, and upon which judgment is rendered, is the verdict received from the lips of the foreman in open court. When the jury have been permitted to separate after agreeing upon and sealing up a verdict, there is this difference between civil and criminal cases: In a civil action, if the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the court may send them out again, and a fuller or different verdict afterwards returned will be good. But in a criminal case, the oral verdict pronounced by the foreman in open court cannot be received, unless it is shown to accord substantially with the form sealed up by the jury before their separation. *Lawrence* v. *Stearns*, 11 Pick. 501. *Pritchard* v. *Hennessey*, 1 Gray, 294. *Commonwealth* v. *Townsend*, 5 Allen, 216. *Commonwealth* v. *Durfee*, 100 Mass. 146. *Commonwealth* v. *Carrington*, 116 Mass. 37. *Dornick* v. *Reichenback*, 10 S. & R. 84. *Lord* v. *State*, 16 N. H. 325.

By the settled practice in this Commonwealth, the course of proceeding upon the return of the jury into court in a criminal case is as follows: The clerk asks the jury if they have agreed upon their verdict. If the foreman answers that they have, the clerk then asks whether they find the defendant guilty or not guilty. The foreman answers, "Guilty," or "Not guilty." The clerk then makes on the back of the indictment a minute of the verdict so returned, and, having done this, says to the jury, "Gentlemen of the jury, hearken to your verdict as the court has recorded it. You, upon your oaths, do say that the prisoner at the bar is guilty," (or "not guilty.") "So you say, Mr. Foreman, and so, gentlemen, you all say."

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The question of the clerk, whether the jury have agreed upon their verdict, and the answer of the foreman that they have, are merely preliminary, and do not show what the verdict is. The form of verdict signed and sealed up by the jury has no weight or effect, except to preclude the idea of the jury having been influenced in arriving at their oral verdict by anything that has occurred in the interval between their separation and their return into court. *Commonwealth* v. *Carrington*, 116 Mass. 37, 40. The final declaring of the verdict by the clerk assumes it to have been already rendered by the jury and recorded by the court, and is intended to proclaim the actual and formal decision of the jury as understood by the court, and to enable any misapprehension in the record of that decision to be corrected by the jury before they are discharged. *Rex* v. *Parkin*, 1 Moody, 45. *The Queen* v. *Vodden*, Dearsly, 229; *S. C.* 6 Cox C. C. 226. Any or all of these precautions for making sure that the verdict expresses the deliberate conclusion of the jury cannot of themselves constitute a verdict, or dispense with the return of a verdict in proper and legal form.

The law requires the double safeguard against mistake: 1st, the delivery of the verdict by the foreman as the organ of the jury, by word of mouth, in open court, under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused; and, 2d, the proclamation by the clerk of that verdict, as understood and recorded by the court. The fact that in this Commonwealth the defendant is not entitled or permitted, as he is in England and in many states, to have the jury polled, makes it peculiarly important for the security of his rights to adhere to the established forms, remembering the words of Chief Justice Shaw, "In this respect it is true that forms are substance." *Commonwealth* v. *Roby*, 12 Pick. 496, 514, 515.

In the case at bar, after the jury, upon their return into court, had been asked whether they had agreed upon their verdict, and the foreman had answered that they had, the form of verdict which had been signed and sealed up before the jury separated was silently delivered by the foreman to the clerk, and was opened and read by the clerk to the jury. The clerk thereupon told the jury (in the words accustomed to be used after a verdict

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has been pronounced by the foreman and minuted by the clerk) to hearken to their verdict as the court had recorded it. And the bill of exceptions states that "the above is all that was said."

In *Commonwealth* v. *Carrington*, already cited, upon which the attorney general principally relies, the bill of exceptions stated that, before the verdict was recorded, the clerk asked the jury if their verdict was that the defendant was guilty, to which they assented; and, although the precise form in which such inquiry and response were expressed was not set forth in the bill of exceptions, it was assumed, both by the counsel and by the court, that an oral verdict had been returned in due form, if any such verdict could be received after the jury had separated and had brought in a sealed verdict.

But, in the present case, it distinctly appears that when the clerk told the jury to hearken to their verdict as recorded, no legal or effectual verdict had been returned by the jury, and they had not been asked, nor, in any form of words, orally and publicly stated, what their verdict was; and that, after they had been told that a verdict of guilty had been recorded, they simply said nothing. A verdict which has never been spoken by the jury cannot be implied from the mere omission of the jury to contradict the statements of the clerk, or from the silence of the prisoner and his counsel.

The verdict received and recorded by the court not being a legal verdict, it was the right of the defendant, upon his motion filed on the same day, to have it set aside. The order of the Superior Court, overruling this motion and denying him this right, was a decision upon a question of law which could not have been raised before verdict, and was therefore a proper subject of a bill of exceptions. Gen. Sts. *c.* 115, § 7.

As, for these reasons, the defendant, in the opinion of a majority of this court, is entitled to a new trial, it is unnecessary to consider whether the instructions given by the judge to the officer after the court had adjourned, and in the absence of the defendant and his counsel, or those communicated to the jury by the novel, and, so far as we are informed, unprecedented method of printing them on a blank form of verdict, legally justified the separation of the jury before they returned into court.

Exceptions sustained.

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COMMONWEALTH *vs.* GUSTAVUS HOYER.

Suffolk. June 27. — July 29, 1878. COLT & SOULE, JJ., absent.

A complaint, charging the defendant with the unlawful sale of liquor on the Lord's day, "not having then and there any license, authority or appointment to make such sale," is supported by proof that the defendant was the agent or bar-keeper of the licensee of the premises on which the sale was made, and that he was not authorized to make such sale; and is not vitiated by the fact that it is not sufficient in form as a complaint for violation of the Lord's-day act, or as a complaint for violation of the provisions of a license.

A complaint, charging the defendant with the unlawful sale of liquor on the Lord's day, "not having then and there any license, authority or appointment to make such sale," sets forth the act charged with sufficient formality.

COMPLAINT to the Municipal Court of the city of Boston, averring that Gustavus Hoyer, of Boston, on March 24, 1878, "that day being the Lord's day, at Boston aforesaid, and within the judicial district of said court, unlawfully did sell intoxicating liquors to a man whose name is unknown to said complainant, the said Hoyer not having then and there any license, authority, or appointment, according to law, to make such sale of said intoxicating liquors on the said Lord's day," &c.

At the trial in the Superior Court, before *Aldrich*, J., it appeared in evidence that the defendant made the sale at the time alleged. It was contended by the defendant and admitted by the government that the defendant was the agent or bar-keeper of the licensee of the premises in which the sale was made; but the defendant did not contend that he was authorized to make such sale.

The defendant asked the judge to instruct the jury as follows: "1. Under the form of the complaint in this case, the government must show that the defendant held a license as licensee of the premises in which the liquor alleged to be sold by him was sold, and that he was guilty of a violation of the license so held by him. 2. Under the present form of the complaint, the defendant cannot be convicted on the evidence in the case. 3. Under the facts in this case, the complaint should have been drawn under the Lord's-day act."

The judge declined to give these instructions; the jury returned a verdict of guilty; and the defendant alleged exceptions.

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M. Fischacher, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

LORD, J. This is not a complaint against the defendant for violation of his license to sell intoxicating liquors. The defendant was not a licensee. Nor did he claim that he was acting as agent or servant of a licensee. The equivocal phrase used in the bill of exceptions, that he "did not contend that he was authorized to make such sale," is to be construed that he did not contend that he was authorized by the licensee to make the sale. We say this is the proper construction, because the object is apparent, that the act done by the defendant should not be considered the authorized act of the licensee, and thus be the foundation for proceedings by which the license should be revoked. It is simply this: the person charged might, if the sale had been made at another time, have offered his employer's license in evidence as a justification. The fact that the sale is alleged to have been made upon the Lord's day does not vitiate the complaint, as a complaint for an unlawful sale of liquor, even although the charge is not sufficient in form as a complaint for doing unnecessary work on the Lord's day, or as a complaint for violating the provisions of a license. The act charged is an illegal act, set forth in sufficiently formal terms. *Commonwealth* v. *Fredericks*, 119 Mass. 199. The act is proved sufficiently. No justification or excuse is offered in defence.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN F. T. SEGO.

Suffolk. June 25. — Aug. 27, 1878. COLT & SOULE, JJ., absent.

After the arrest of a clerk, nineteen years old, for larceny of his employer's goods, and while out on bail, the employer said to him, "I am satisfied that there are other receivers whom we have not yet discovered. I should like to have you make a clean breast of this matter;" and the clerk thereupon made a confession. *Held*, that the words used by the employer contained no promise or threat; and that the confession was admissible in evidence against the clerk on his trial for the larceny.

It is not necessary to prove the time as alleged in an indictment for larceny.

On the trial of an indictment containing five counts, for larceny in a building, of the property of R., it appeared that the defendant had confessed to R. that he

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had, during the time covered by the indictment, stolen from his shop at different times, large quantities of the goods described in the indictment; that some of the larcenies he committed alone, and some were committed jointly with an accomplice, but he fixed no particular occasion of larceny. The accomplice testified that he and the defendant had, for a period of some months, at various times, stolen from the shop such goods as were described in the several counts of the indictment, but he did not fix any particular occasion of larceny. The judge instructed the jury that "if they found from the evidence, including the confession of the defendant, that he had, on five different occasions, within the period covered by the several counts, stolen articles described in the several counts of the indictment respectively, they would be authorized to render a verdict of guilty, and not otherwise." *Held*, that whether there were five distinct larcenies proved was a question of fact for the jury, and was properly submitted to them.

INDICTMENT in five counts, charging the defendant with larceny of certain goods, the property of George E. Rogers, in a certain building, to wit, the shop of said Rogers. The first count charged the larceny on May 1, 1877, of 100 dishes and 275 baskets; the second count, the larceny on June 6, 1877, of 240 plates, 600 bowls and 300 pitchers; the third count, the larceny on July 10, 1877, of 50 dishes, 860 teapots and 9 clocks; the fourth count, the larceny on September 5, 1877, of 100 dishes and 275 baskets; and the fifth count, the larceny on October 3, 1877, of 100 dishes and 275 baskets.

At the trial in the Superior Court, before *Aldrich*, J., the government, for the purpose of proving a confession made by the defendant to Rogers, in whose employ he was, called Rogers as a witness, who testified in substance that, after the defendant had been arrested and given bail, the witness sent for him, invited him into his private office, with one Adams, a salesman, and began the conversation by saying to the defendant, "I am satisfied that there are other receivers whom we have not yet discovered. I should like to have you make a clean breast of this matter, as Williams (an accomplice) has done;" that the defendant, who was nineteen years of age, confessed that he had, during the time covered by the several counts of the indictment, stolen from the shop of Rogers, at different times, large quantities of the goods described in the indictment; that he had taken silver ware and clocks from the shop in his pockets, and sold them to pawnbrokers for a trifle, and had taken from the shop baskets of crockery ware and other articles, of the kind described in the different counts of the indictment, to a certain

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house in Boston, and there he and Williams always divided the proceeds, when either assisted the other in a larceny; that some of his thefts were committed jointly with Williams, and others he committed alone; but he fixed no particular occasion of larceny, either by date or otherwise.

Adams, who was called as a witness by the government, substantially corroborated Rogers. The defendant seasonably objected to the admission of the confession, on the ground that such an inducement had been held out as to render it incompetent.

Rogers further testified that he had lost large quantities of goods such as were described in the several counts of the indictment; that the defendant had taken them, and that some of the goods had been recovered by him from two of the receivers named by the defendant; but he admitted that he knew of the loss of the goods only "by estimation," and not of his own knowledge, and that he knew of the defendant's acts only by the confession, and by what others had told him.

Williams, who had been sentenced, was called by the government, and testified that he and the defendant had for a period of some months, at various times, stolen from the shop of Rogers such goods as were described in the several counts of the indictment, but he did not fix any particular occasion of larceny. The defendant objected to the admission of his testimony on the ground that it was too general.

This was all the evidence to show that a larceny had been committed. There was no question raised as to the ownership and value of the property described, nor as to the fact that it was stolen in the shop of Rogers, if stolen at all. The defendant offered no evidence, and asked the judge to rule as follows: "1. That the evidence does not warrant a conviction upon any count, because no particular act of larceny is proved. 2. That the evidence, for the same reason, does not warrant a conviction upon more than one count. 3. That the evidence warrants no verdict of a greater offence than simple larceny upon any count. 4. That there is no evidence which will warrant a verdict of guilty upon any count of the indictment."

The judge refused so to rule; and instructed the jury that, "if they found from the evidence, including the confession of

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the defendant, that he had, on five different occasions within the period covered by the several counts, stolen articles described in the several counts of the indictment respectively, they would be authorized to render a verdict of guilty, and not otherwise."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. C. Bent, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

LORD, J. The statutes of this Commonwealth determine what shall be deemed aggravations of larceny. Gen. Sts. *c.* 161. By §§ 18, 21, the degree of punishment is fixed by the amount stolen. Section 16 provides the penalty for stealing from a building on fire, or property removed in consequence of an alarm of fire. Section 15 prescribes the punishment for stealing "in a building, ship or vessel." The amount stolen is not material under the last section cited. In this case the bill of exceptions states that at the trial "there was no question raised as to the ownership and value of the property described, nor as to the fact that it was stolen in the shop of said Rogers, if stolen at all." The aggravation is therefore established, if there was no error in the trial.

The first exception taken is to the admission of the defendant's confession, upon the ground that it appears that it was not voluntary. *Primâ facie*, all confessions are voluntary, and it is for the party objecting to their admission as evidence to show that they were uttered under such pressure of hope or fear as to raise a doubt of their accuracy. It is undoubtedly the duty of the court to guard carefully the rights of a defendant in this respect; and more especially so when the prisoner is in the custody of the law and the hopes or fears are supposed to be raised by an officer of the law. The fact that a defendant may think it will be better for him if he confesses, or thinks it will be worse for him if he does not confess, is immaterial, if that condition of mind is brought about by his own independent reasoning. It is when that state of mind is induced by promises or threats or other inducement from without, that the confession is to be rejected. In this case, there was no promise or threat; there was at the most only an implied belief that he was guilty and a desire that he should tell what he knew, all expressed in this language:

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"I am satisfied that there are other receivers, whom we have not yet discovered. I should like to have you make a clean breast of it." In this there was nothing of threat or promise.

The case of *Commonwealth* v. *Cullen*, 111 Mass. 435, differs widely from the case at bar. In that case, it was decided that, if a defendant made a confession under such inducements held out by an officer as in law should exclude the confession, a subsequent confession made to another party was inadmissible, if in fact it was made because of such inducement; and that is all which the case decides.

The case of *Commonwealth* v. *Morey*, 1 Gray, 461, cited upon this point by the defendant, presented a much stronger case for the exclusion of the confession than the present; for among other things said to the prisoner, who was then in jail, was this, that "he thought it was better for all concerned, in all cases, for the guilty party to confess," and in that case the confession was held to be admissible.

The next objection is, that, the evidence being general, it could not be applied to any particular count of the indictment. This position is also untenable. Although it is necessary to allege in an indictment a time of the commission of an offence, that time need never be proved as alleged.

Commonwealth v. *Elwell*, 1 Gray, 463, stands upon entirely different principles. In that case, the charge against the defendant was that of being a common seller of intoxicating liquors. The offence was alleged to have been committed on the first day of January, and that day only was named. The court decided that the offence charged was that of having acquired a particular character, which could be acquired only by a succession of acts; and Dewey, J., in delivering the opinion, commented upon the unusual mode of declaring such offence to have been committed upon a day certain, when the very nature of the offence demanded a succession of acts to constitute it; and stated the familiar mode of declaring against such offence, by an averment that the character had been acquired by acts done on a certain day, and on divers days and times from said day to the day of finding the indictment; or upon a certain day and on divers days and times between such day and another subsequent day certain. In those cases, which stand upon peculiar rules, the

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character must be acquired by acts proved to have been done within the prescribed times; and the pleader having elected to limit such time to a single day, he is equally bound to confine his evidence to the time declared. The court having previously decided that the character of a common seller might be acquired by acts done on a single day, the pleader elected that day as the time when the character was acquired. The judge, however, threw out the suggestion, but did not deem it necessary to the decision of the case, that even in such case it might be necessary further to allege that the party became a common seller by successive acts upon such day.

It not being necessary to prove the time as alleged, it was competent for the jury to apply the evidence to such counts of the indictment as it tended to support.

It was also contended that the evidence would not warrant the jury in convicting upon all the five counts of the indictment. That was a pure question of fact for the jury, if there was any evidence of five different larcenies. We think there was such evidence. The earliest time named in the indictment as the date of any larceny is May 1, 1877; the latest time is October 3, 1877, a period of over five months. The confession of the defendant was that, during the time covered by the indictment, he had stolen from the shop of Rogers at different times large quantities of the goods described in the indictment; that he had taken silver ware and clocks in his pocket and sold them to pawnbrokers for a trifle; and had taken baskets of crockery ware and other articles described in the indictment to a certain house in Boston; and there he and Williams always divided the proceeds when either assisted the other in a larceny; that some of the thefts were committed jointly with Williams, and that others he committed alone. Williams testified that he and the defendant had for a period of some months, at various times, stolen from the shop of said Rogers such goods as are described in the several counts of the indictment. It was certainly competent to submit to the jury upon this evidence whether five larcenies had been committed.

It is objected that the jury were not authorized to apply this evidence to any particular count of the indictment. This is also a question for the jury. The evidence was that such property

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as was described in the several counts of the indictment was stolen. The identity of that stolen and that described was for the jury, no question of ownership or value being raised.

The further question was made at the argument, whether this offence was properly described as larceny in a building. That question is not open upon the bill of exceptions.

Exceptions overruled.

EDWARD E. DENNISTON *vs.* JAMES W. CLARK.

Hampshire. Sept. 20. — Nov. 4, 1876. COLT & MORTON, JJ., absent.
Sept. 18, 1877. — Aug. 3, 1878. ENDICOTT & LORD, JJ., absent.

In an action of tort against a surveyor of highways for the removal, while acting within the scope of his authority, of earth and gravel from the highway in front of the plaintiff's estate for the purpose of making repairs, the surveyor's judgment as to the necessity of such repairs is conclusive, and his good faith in making them cannot be questioned, whether the repairs are made opposite such estate, or on another part of the way or on another highway within his jurisdiction; and the only remedy is under the Gen. Sts. c. 44, § 19.

A surveyor of highways, while acting within the scope of his authority, may remove earth and gravel from one highway or part of a highway to another within his jurisdiction.

TORT for breaking and entering the plaintiff's close, and carrying away therefrom one thousand loads of earth and stone. Writ dated September 2, 1874. Answer: 1. A general denial. 2. That the acts complained of were done by the defendant as highway surveyor in repair of the highways within his jurisdiction. Trial in the Superior Court before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The evidence tended to show that the plaintiff owned land on Prospect Hill, on the northerly side of Prospect Street, in Northampton; that against this land the highway descended the hill on a sharp grade; that in 1869 the county commissioners ordered that this highway be straightened and regraded for a distance of between one and two miles; that, after the road was so constructed and finished, it was accepted by the commissioners; that the excavations and repairs left high banks on each side of the

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highway near the brow of the hill, in some places as high as ten feet on the plaintiff's side of the highway; that the material removed was composed of hardpan and gravel, well suited to the hardening of the road-bed of highways; that much the larger portion of the earth removed in constructing the highway, as ordered by the county commissioners, was used in raising the road-bed at the bottom of the hill against the lands of other owners abutting on said highway; and considerable more was used in hardening other parts of the same road, and some of it was used upon Spring Street, a half a mile or more away from the plaintiff's land.

There was also evidence tending to show that, after the road was so constructed, the high bank on the plaintiff's side of the road, which was composed of boulders, cobble-stones, gravel, and a kind of earth easily affected by frost, as the frost came out in the spring, would slough off in such quantities as to fill up the ditch along the roadside, and, in heavy rain and melting snows, would cause the water to overflow the road-bed.

The defendant testified that at the time of the alleged tort he was repairing the highway in front of the plaintiff's estate by cleaning out the gutter, which had become filled up by slides of earth from the bank, and by giving such increased width to the gutter and such slope to the bank all along down the hill as would more effectually prevent the filling up of the gutter and the consequent overflow and wash of the road-bed; that he removed the surface material derived from the cutting down of the bank to repair Elm Street and South Street, points remote from the plaintiff's land but within the limits of his jurisdiction as surveyor; that in his judgment the repairs made by him were required for the well being and best security of the road; that he made them in good faith, and that the material removed was needed at the places where used.

The plaintiff offered evidence tending to show that the defendant was not at this time making repairs on the highway in front of the plaintiff's land, but that he was there for the purpose of obtaining earth and gravel from the embankment against the plaintiff's land to use on other highways, remote from Prospect Street. The defendant objected to this evidence; but the judge admitted it.

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The defendant asked the judge to instruct the jury that, even though he was not making repairs on the highway in front of the plaintiff's premises, he had the right to take such material from the embankment in question, within the limits of the highway, as he had occasion to use in repairing other highways within his jurisdiction.

The judge declined to give this instruction; but instructed the jury "that, after the original construction of the highway, as above referred to, and its acceptance by the commissioners in 1869, the town had no right to remove the soil in front of the plaintiff's premises, unless it became necessary, in the judgment of the highway surveyor, to do it for the purpose of keeping the highway in repair, and making it safe and convenient for public travel at that place; that if the defendant, in the exercise of his duty as surveyor, cut down this embankment for the purpose of repairing the road, and making it thus safe and convenient, he had the right so to do, and the right to carry away the soil which it became reasonably necessary so to remove, and to use it for the purpose of repairs upon such other of the highways belonging to the town within his precinct as needed such repairs; but that, if he was not *bonâ fide* repairing the way at this point, he had no right to take the soil merely for the purpose of making or repairing other highways; that if he was at work for the purpose for which he testified, he was repairing the highway, and his judgment was conclusive as to the time and manner of doing it, and he was not to be held responsible for any errors of judgment; but that it was for the jury to say whether such was his purpose, that his saying that such was his purpose was not conclusive upon the jury, but they had the right to say, upon all the evidence in the case, whether such was his purpose and judgment."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which were argued in 1876.

C. Delano, for the defendant.

D. W. Bond & H. H. Bond, for the plaintiff.

LORD, J. We think the case of *Benjamin* v. *Wheeler*, 8 Gray, 409, decisive of this. The ruling of the presiding judge was accurate, with the exception that he permitted the jury to pass upon the question of the good faith of the surveyor in his mode

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of making repairs. There seemed to be no controversy at the trial upon the question whether the defendant was a surveyor of highways; nor whether he was engaged in making repairs. And the instructions to the jury were based upon these facts; that the defendant was a surveyor of highways, and was in the execution of his official duty. Under such circumstances, neither his judgment nor his good faith can be revised by a jury. The question whether he was acting within the scope of his authority cannot be made to depend upon his state of mind.

If the presiding judge meant by his instruction to rule that an excavation in the bank could only be made for the purpose of repairing at the point where the excavation was made, the ruling is equally erroneous. When a highway is located and constructed, the entire land within its limits is appropriated to the public use, and the owner is entitled to compensation therefor in the mode provided by law. Gen. Sts. *c.* 43, §§ 14, 62. If, after such land is condemned to the public servitude, the owner of adjoining land sustains damage by reason of any act done for the purpose of repairing said highway, he is entitled to compensation in the mode provided by the statute. Gen. Sts. *c.* 44, § 19.

The case does not show, nor was there any offer to prove, that the acts done by the defendant were not within the scope of his authority as surveyor of highways; but the presiding judge allowed the jury to find that the acts done, although done while acting within the scope of his authority, were legal if done *bonâ fide*, but not legal if not done *bonâ fide*, thus making the legality of his acts depend, not upon his right to do the things done, but upon his good faith. The only questions which should have been submitted to the jury were, First, Was the defendant surveyor of highways in the town of Northampton? and, Second, Were the acts done, done by him as surveyor of highways and thus within the scope of his authority, and this irrespective of his motives or good faith? If so, the defendant cannot be held to answer to an action of tort for an injury sustained by the plaintiff, but he must seek his remedy under the statute.

It is possible that the presiding judge, in using the words *bonâ fide*, meant only "really" or "in point of fact." So that the construction of his ruling would be, if the defendant was not really or in point of fact repairing the way at this point, he had

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no right to take the soil merely for the purpose of making or repairing other highways. If such be the meaning intended, the language is inappropriate; and without deciding that, as an abstract proposition, it would be erroneous, yet it would be inapplicable to this case. It is not the province of a surveyor of highways to make ways, but to repair existing ways; nor was this defendant engaged in making a way; and what would be "other highways," in contradistinction to "this point," in a way recently relocated for a distance of between one and two miles, is not defined; and the entire instruction would leave upon the minds of the jury the conviction that they could revise the motives and good faith of the surveyor, which, under the authority of the case cited, cannot be done. See also *Morrison* v. *Howe*, 120 Mass. 565.

The language of the court in *Callender* v. *Marsh*, 1 Pick. 418, 435, is applicable to the facts of this case. "In no case can a person be liable to an action as for tort, for an act which he is authorized by law to do." If the petitioner suffered any injury by the acts of the surveyor in repairing the highway, he is entitled to compensation under the Gen. Sts. *c.* 44, § 19, but not in an action of tort. See *Burr* v. *Leicester*, 121 Mass. 241.

Exceptions sustained.

Upon a second trial in the Superior Court, before *Allen*, J., the evidence was substantially the same as at the first trial; and it was conceded that the defendant was a highway surveyor, and that Prospect Hill, from which he took the earth, Elm Street and South Street, where he assumed to make the repairs, were all within his jurisdiction.

The defendant contended that his own judgment, exercised at the time of the acts complained of, was conclusive on the question whether or not he was making repairs in front of the plaintiff's land, and, it being conceded that he had jurisdiction over that highway and was doing the acts imputed to him within the limits of the highway, that the acts done by him must be taken to have been repairs, and the jury would not be authorized to find the contrary; and that whether making repairs or not in front of the plaintiff's land, he had a right as surveyor to remove from within the limits of the highway opposite the plaintiff's

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land whatever material was necessary and convenient for repairing Elm Street and South Street, at places within his jurisdiction.

But the judge ruled that it was a question for the jury, whether or not the defendant, in his capacity of highway surveyor, was doing the acts and removing the earth on the highway opposite the plaintiff's land for the purpose of making repairs on that portion of the highway; and that if he was not, but was there solely for the purpose of getting material to remove to Elm Street and South Street, for the purpose of making repairs there, he could not justify under his authority as surveyor.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which were argued by the same counsel in 1877.

GRAY, C. J. As stated by Chief Justice Parker, in the passage which is made the foundation of the learned argument for the plaintiff, "It is too clear to require any discussion, that the proprietor of land, over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the Legislature." *Tucker* v. *Tower*, 9 Pick. 109, 110.

The owner of the land therefore retains his title in trees, grass, growing crops, buildings and fences standing in the highway at the time of the laying out, (unless he fails to remove them within a reasonable time after notice to do so,) as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made. Gen. Sts. *c.* 43, §§ 13, 39. *Goodtitle* v. *Alker*, 1 Kenyon, 427, 437; *S. C.* 1 Burr. 133, 143. *Adams* v. *Emerson*, 6 Pick. 57. *Commonwealth* v. *Noxon*, 121 Mass. 42. *Tucker* v. *Eldred*, 6 R. I. 404. *Overman* v. *May*, 35 Iowa, 89. The decision in *Smith* v. *Rome*, 19 Georgia, 89, cited for the plaintiff, unless it can be considered as substantially a case of a quarry, cannot be upheld. Dillon Mun. Corp. (2d ed.) § 544, note.

But it is equally clear that the grant of such an easement to the public, or to the corporation to which its rights have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent, that

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is necessary or proper to make and keep the way safe and convenient for the public travel. *Callender* v. *Marsh*, 1 Pick. 418. *Smith* v. *Washington*, 20 How. 135. *Boston* v. *Richardson*, 13 Allen, 146, 159. *Pontiac* v. *Carter*, 32 Mich. 164. All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another; and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation or a railroad company in the case of a turnpike or railroad, has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike or railroad, to take earth, gravel or stones from one part and deposit them on another, although if the officer applies them to other uses he may become liable as a trespasser.

In *Adams* v. *Emerson*, for instance, in which an action was maintained by the owner of land over which a turnpike road had been laid out, against a servant of the corporation, for taking the herbage growing thereon, Mr. Justice Wilde, delivering the opinion of the court, said, "The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject however to the easement or rights incident to a public highway, such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand and gravel, and may dig or cut up sods and turf." 6 Pick. 58. See also *Phillips* v. *Bowers*, 7 Gray, 21, 26; *Burr* v. *Leicester*, 121 Mass. 241; *Jackson* v. *Hathaway*, 15 Johns. 447, 453; *Fish* v. *Mayor, &c. of Rochester*, 6 Paige, 268, 272; *Bissell* v. *Collins*, 28 Mich. 277; *Baxter* v. *Winooski Turnpike*, 22 Vt. 114; *Cole* v. *Drew*, 44 Vt. 49; *Chapin* v. *Sullivan Railroad*, 39 N. H. 564; *Aldrich* v. *Drury*, 8 R. I. 554.

In New England, at least, the same rule has been applied by law and usage to the taking of materials from one highway for the repair of another within the jurisdiction of the same municipal authorities. *Hovey* v. *Mayo*, 43 Maine, 322. *New Haven* v. *Sargent*, 38 Conn. 50. In such a case, both highways must,

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for this purpose, be deemed as much parts of one plan of public improvement for the accommodation of the public travel, as if they formed parts of a continuous line of road called by one name, as in the case of a turnpike or of a railroad. In *Delphi* v. *Evans*, 36 Ind. 90, to which the plaintiff has referred us, although there are *dicta* inconsistent with this view, the decision appears to have been based upon the want of any such order of the city council as was required by statute.

The office of surveyor of highways existed in England long before the settlement of Massachusetts. The St. of 2 & 3 P. & M. *c.* 8, required surveyors to be chosen in each parish, and the parishioners to work on the highways four days in each year under their supervision. The St. of 5 Eliz. *c.* 13, recited, as a defect in the previous statute, "that such substance and matter as is most fit and convenient for the reparations of the said ways cannot be lawfully had, fetched and taken out of the several grounds and soil thereunto nigh or adjoining;" and therefore enacted that the surveyors, "for the better reparation and amendment of the ways within their several parishes and limits," might, "if it shall be to them so thought necessary," take broken stones or rubbish already dug in private quarries, and for want thereof dig gravel, sand or cinder, in the several grounds (except houses, gardens, orchards or meadows) of any person within the parish, "and nigh adjoining to the way or ways wherein such reparations shall be thought necessary to be made," and likewise "gather stones lying upon any lands or grounds within the parish, and meet to be used for such service and purpose, and thereof to take and carry away so much as by discretion of the said supervisors shall be thought necessary to be employed in the amendment of the said highways." Those statutes, with some temporary modifications, continued in force until near the time of the American Revolution, and were then superseded by other statutes containing similar provisions. Com. Dig. Chimin, C. 4. Sts. 14 Car. II. *c.* 6; 7 Geo. III. *c.* 42; 13 Geo. III. *c.* 78.

In Massachusetts, surveyors of highways were authorized to be chosen in each town by some of the earliest acts of the Colony and of the Province. Col. St. March 3, 1635–6; 1 Mass. Col. Rec. 172. Prov. St. 1692–3 (4 W. & M.) *c.* 28, § 4; 1

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Prov. Laws (State ed.) 65. Anc. Chart. 195, 248. No colonial or provincial statute specified their duties, until the highway act of 1693–4 (5 W. & M.) *c.* 6, § 1, declared that the surveyors of highways in each town should "take care that all highways, private ways, causeys and bridges, lying within the precincts of such town, be kept in repair, and amended from time to time, when and so often as shall be needful;" and should be empowered, among other things, "to dig for stone or gravel, clay, marl, sand or earth, in any land not planted or enclosed." 1 Prov. Laws, 136; Anc. Chart. 267.

An early statute of the Commonwealth in like manner authorized surveyors of highways "to dig for stone, gravel, clay, marl, sand or earth, in any land not planted or enclosed, and the materials, thus dug up, to remove to such place or places in the highways, for the repair and amendment thereof, as they shall determine necessary." St. 1786, *c.* 81, § 1. The object of this provision, as of the corresponding ones in the statutes of England and of the Province, manifestly was to grant the power of taking materials for the repair of highways from private lands not within their limits. This is made even more clear by the form in which it was reported by the commissioners on the Revised Statutes, namely, "to dig in any adjoining land not cultivated or enclosed," &c. Report of Commissioners on Rev. Sts. *c.* 25, § 3. It doubtless recognizes or implies, but, in strict accuracy and having regard to the history of the statute law upon the subject, it cannot be asserted (as when, having no occasion to examine this point critically, it was said in *Callender* v. *Marsh*, 1 Pick. 427) that it "gives the power to take from any hill in the road the material necessary for filling up any part of it which requires raising." The omission of this provision, therefore, by the Legislature, in the Revised Statutes of 1836, does not impair the authority of a surveyor of highways to remove earth and gravel from one highway or part of a highway to another within his jurisdiction, which had in all the earlier statutes been assumed to be so incident to his office and duty as to need no express affirmance or mention.

Nor is the authority of the surveyor in this respect diminished by the Gen. Sts. *c.* 44, § 19, reënacting the Rev. Sts. *c.* 25, § 6, and providing that "when an owner of land adjoining a highway

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or town way sustains damage in his property, by reason of any raising, lowering or other act, done for the purpose of repairing such way, he shall have compensation therefor," to be determined as therein provided. This statute does not affect the extent of the authority of the public and its officers, or the principle upon which that authority rests. It only affords additional compensation in such cases as come within it; and, whether it must be strictly limited to acts done for the purpose of repairing the particular highway or town way adjoining the land of the petitioner, or may be liberally construed as a remedial statute so as to include acts done in the way adjoining his land for the purpose of repairing a highway or town way elsewhere, it does not make any act of the town or its officers a tort which would not have been so before. *Elder* v. *Bemis*, 2 Met. 599, 604. *Brown* v. *Lowell*, 8 Met. 172, 176. *Brainard* v. *Clapp*, 10 Cush. 6, 9.

The acts of the defendant, in removing earth and gravel from a highway within the limits of his jurisdiction as a surveyor, and opposite the plaintiff's land, were apparently within the scope of the defendant's official duty; his judgment exercised at the time of doing them was conclusive upon the question whether they were necessary for the purpose of repairing the highways, either at the place from which they were taken, or at the other places within his jurisdiction where they were afterwards deposited by him; and the plaintiff had no other remedy, for any injury to his land in consequence of such acts, than under the Gen. Sts. *c.* 44, § 19. *Benjamin* v. *Wheeler*, 8 Gray, 409, and 15 Gray, 486. *Bay State Brick Co.* v. *Foster*, 115 Mass. 431. *Morrison* v. *Howe*, 120 Mass. 565. *Burr* v. *Leicester*, 121 Mass. 241.

To submit to a jury, in an action of tort against a surveyor, the question whether he in fact did the acts complained of for the purpose of making repairs, when those acts appear to be suitable for that purpose, is substantially equivalent to trying the questions of the necessity of the repairs and the motives and good faith of the surveyor, which, as has already been decided, at a former stage of this case, cannot be done.

For these reasons, we are all of opinion that upon both the questions raised at the trial the defendant's positions were well taken, and the instructions given to the jury were erroneous.

Exceptions sustained.

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JOHN S. CLARK *vs.* CITY OF WORCESTER.

Worcester. Oct. 3, 1877. — Aug. 30, 1878. ENDICOTT & LORD, JJ., absent.

On a petition for the assessment of damages for the taking of land by the city of Worcester under the St. of 1867, *c.* 106, providing for a system of sewerage for the city, the presiding judge refused to rule that the city had a right of way over the location and a right to keep the location of the sewer free from structures by abutters, but instructed the jury that the city could enter upon the land, make repairs, reconstruct and make such changes as it saw fit, subject to which right the petitioner could use and improve the land as he wished. *Held*, that the petitioner had no ground of exception.

The assessment by the city of Worcester under § 4 of the St. of 1867, *c.* 106, providing for a system of sewerage for the city, of the benefit to an estate from which land is taken for the construction of a sewer, includes such benefit only as is derived in common with the other estates drained thereby; and a peculiar benefit to the estate may be set off by the city in the assessment of the owner's damages for the taking of his land.

PETITION under the St. of 1867, *c.* 106, for a jury to assess damages for the taking of land by the respondent for the construction of the Mill Brook Sewer in Worcester. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the respondent took, in constructing its sewer, a strip of the petitioner's land seventeen feet wide, being the westerly half of its location where it abutted on the petitioner's remaining land; and that the sewer extended a mile each way from the petitioner's land. The order of taking was as follows:

"City of Worcester. In City Council. December 30, 1867. Voted, That we adjudge it necessary for purposes of sewerage, drainage and the public health, to fix the boundaries of that portion of Mill Brook between the northerly side of Green Street and the southerly side of Front Street, to straighten, deepen and pave the channel of said brook between the termini aforesaid, and to inclose the same in retaining walls, and to appropriate, establish and lay out the same as a main drain and common sewer. Therefore ordered, that the boundaries of Mill Brook between the termini aforesaid be fixed as follows." [Then followed the boundaries of the sewer.] "And that the same sec-

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tion of said brook above described be established and laid out as a main drain and common sewer and suitably paved and enclosed in retaining walls."

There was evidence tending to show that the sewer was laid out thirty-four feet in width, and was very strongly built in the form of an arch about nine feet in height, the thickness of the masonry being some eighteen inches, and the outside span of the walls at the base about thirty feet, the bottom of the water-course having been sunk in building the sewer some five feet, and the sewer paved with stone; that, before the sewer was built, Mill Brook had become foul, and was covered in by the sewer arch, and that freshets had caused the cellar of the petitioner's building to be sometimes flooded, which was no longer so after the building of the sewer, by reason of the lowering of the stream; that the whole of the land taken was covered with water in 1867, but had been actually occupied by the petitioner, for more than twenty years before the taking, by piles driven in the soil, upon which, platforms and some wooden buildings had stood for the whole period, which were used for business purposes; and that it was practicable for the petitioner to have built a brick building over the water, on stone arches set on piles, without any greater obstruction to the flow of the water than that caused by the piles.

The respondent contended that the sewer had increased the value of the land taken; that the petitioner had a right to use the land over the sewer for all purposes, including permanent structures, such as buildings, subject only to the right of the respondent to enter to repair the sewer, to reconstruct and make such changes as it saw fit; and introduced evidence tending to show the increased value of the land upon this theory, contending that there was small risk that the respondent would ever be called on to repair the sewer at this point. This evidence was admitted against the objection of the petitioner.

The respondent also contended that the adjoining land of the petitioner, owing to its peculiar location, nature and condition, was greatly benefited by reason of the covering in, sinking and paving of Mill Brook, which benefit, including drainage, was direct and peculiar to this estate, and different in kind from the benefit derived by other estates in the vicinity and abutting on

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the sewer, and which benefit could be set off against the damages suffered by the petitioner. The petitioner offered to show that he had been assessed and had paid his proportionate part of the expenditure incurred by the city in the construction of sewers under the St. of 1867, *c.* 106; that his estate was adjudged by the mayor and aldermen to be benefited thereby in the following orders: "January 19, 1872. Ordered, That the sum of four hundred and fifty thousand dollars be assessed upon the persons and estates benefited, together with such sums as the mayor and aldermen may determine as entrance fees." "April 15, 1872. Whereas the city of Worcester has expended an amount exceeding one million dollars in laying out and constructing sewers and drains, by order of the city council under an Act of the Legislature passed March 29, 1867, and approved by the voters of Worcester, April 16, 1867, and whereas it is adjudged, by the mayor and aldermen of the city of Worcester, that the estates mentioned and described in the foregoing schedule are benefited thereby, and whereas said mayor and aldermen have adjudged that the sum of ten thousand two hundred and twenty dollars is the proportionate share of said expenditure, to be assessed upon said estates and upon the owners thereof, it is therefore ordered, that the persons named in the foregoing schedule, being owners of the estates therein described, which said estates are situated upon streets in which drains and sewers have been laid under and by virtue of said Act, and upon the line thereof, and of estates which are benefited thereby, be and they are hereby charged and assessed with the sums set opposite their respective names, as their respective proportionate shares of said expenditure; and said schedule is hereby committed to the city treasurer and collector, and he is hereby directed to collect of the persons named in said schedule the amounts therein assessed against them respectively. And all said sums shall become due and payable on the third day of June next, and said treasurer and collector shall cause written or printed notices to be given to all persons and parties or their tenants or lessees forthwith." The petitioner contended that the benefit derived from the sewer as a sewer, including drainage of his land, could not be set off in this suit, being contemplated in, and paid for by, the above tax so assessed.

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The judge admitted evidence of benefits, substantially of the character as contended by the respondent, against the petitioner's objection.

The petitioner asked the judge to instruct the jury as follows: "1. Under the statute authorizing the taking of this land by the city, the city, after taking the land, had a right of way over the location, and a right to keep the location of the sewer free from structures by abutters. "2. The respondent is not entitled to have set off as benefits any such effects on the real estate of petitioner as were the natural effect or work of the sewer as a sewer, and this would include drainage of the land, the petitioner's land having been assessed for a sewer assessment under the statute."

The judge refused to give these instructions, but instructed the jury as follows: "The respondent, by the order by which the land was taken and the sewer located, acquired the right to construct and maintain a sewer within the limits of the location, and to enter upon the land to make repairs, reconstruct and make such changes as it saw fit in the sewer; and, subject to these rights of the respondent, the petitioner remained the owner of the land, and had the right to use and improve it in any manner he saw fit; and the respondent is entitled to have allowed by way of set-off, the benefit, if any, to the property of the petitioner from the sewer; but the benefit to be set off must be some direct, peculiar, and special benefit derived by the petitioner's estate from the sewer, and not the general benefit acquired by this, with other estates adjacent to the sewer."

The jury returned a verdict for the respondent; and the petitioner alleged exceptions.

W. S. B. Hopkins, for the petitioner.

F. T. Blackmer, for the respondent.

COLT, J. The city of Worcester, by the St. of 1867, *c.* 106, was authorized to alter and deepen the channels of several brooks, whose names are given; to enclose them in walls, and to cover them so far as might be adjudged necessary for purposes of sewerage, drainage and the public health. The right to take land and water rights was given, subject to the payment of damages, to be assessed in the same manner and upon the same principles as damages are assessed in the laying out of highways.

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Under this authority, Mill Brook, where it passed through the petitioner's land, was laid out as a main drain and common sewer. Its channel was widened, deepened, enclosed in walls, and covered with substantial stone masonry. The petitioner claimed damages for this taking.

At the trial before the jury the city contended that the building of the sewer had increased the value of the petitioner's land taken; that the petitioner had the right to use the land within the location for all purposes, including building purposes, subject only to the right of the city to enter for repairs, to reconstruct, or to make such changes as it saw fit; and was permitted, against the petitioner's objection, to introduce evidence tending to show increased value in the land on account of these rights. The petitioner on this point asked the judge to rule that by the taking of the land the city acquired a right of way over it, and a right to keep it free from structures. But the judge, refusing this, instructed the jury that the city acquired the right to construct and maintain a sewer within the location, with the right to enter upon it, make repairs, reconstruct, and make such changes in the sewer as it saw fit; and that, subject to these rights, the petitioner remained the owner of the land, and had the right to use it in any manner he saw fit.

We are of opinion that the ruling requested was properly refused; that the instruction given was correct and sufficient for the requirements of the case; and that with this instruction, and as necessarily controlled by it, the evidence objected to was properly admitted.

The authority given to the city was to take and appropriate so much of the petitioner's estate as should be adjudged necessary to carry out the purposes of the act. The Legislature did not undertake to define more particularly the nature of the estate required to be taken, or the quantity of the land to be used. The right to take is limited by the public exigency stated; beyond that, the power to exercise the right of eminent domain is not given. The statute is to be strictly construed in this respect. The same terms are used which are employed in the statutes giving authority to take land, to railroad and turnpike corporations, and the same rules of interpretation govern. *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1. *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501.

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The power to take land for the purpose stated does not confer the right to take an absolute estate in fee simple, because such an estate is not necessary to the enjoyment of the defined privilege any more than it would be necessary where land is taken for a highway, railroad or turnpike. The use only of the petitioner's land was taken, and that use is limited to the purposes named. The rule is applicable, which defines the rights of the owner of an easement in the land of another, by determining what is reasonably necessary for the enjoyment of that easement. For all purposes consistent with that enjoyment, the right to use the land remains in the owner of the fee. *Atkins* v. *Bordman*, 2 Met. 457, 467. *Perley* v. *Chandler*, 6 Mass. 454. *Adams* v. *Emerson*, 6 Pick. 57. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1, 11. Thus, if the easement is a public or private right of way over the surface of the land, the rule forbids the erection of anything which obstructs that right. If it is a right to construct and maintain an underground drain, sewer or aqueduct, then the landowner may well use and cultivate the surface of his land, erect fences and perhaps other structures thereon, without any invasion of the rights of the owner of the easement. It is a question which must be submitted to the jury, unless the invasion of the right complained of is so manifest as to leave no question of fact for their consideration.

In this case, it could not be properly ruled in favor of the petitioner, that the city, as matter of law, had a right of way generally over the location in question, or a right to keep it free from all structures. Nor could it be properly ruled, in favor of the city, that the petitioner had the right to erect structures of any description. The use which he might make of the surface of his land is largely a question of fact; it depends on the size and strength of the sewer, the depth of its location, the character and size of the stream of water flowing through it. And, under the instructions given, the question, as bearing on the damages to be assessed, was properly left to the jury.

Upon the question of the benefits which were to be set off against the claim for damages, the judge ruled that they must be direct, peculiar and special benefits derived by the petitioner's estate from the sewer, and not the general benefits acquired

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by this estate with other estates adjoining. By the act under which the sewer was located, the damages were to be assessed in the same way as in the laying out of highways. Section 4 of that act also provides that estates benefited by the sewer shall be assessed a proportionate share of the expenditure of the city for drains and sewers. Under this section, the petitioner had duly paid his assessment, and contended that the benefit, which he insisted included drainage of this land, having been thus paid for, could not be set off in this proceeding. But the assessment under § 4 is an assessment, upon the several classes of estates, of a proportionate share of the expenditure of the city for drains and sewers, and not an assessment for the particular benefit derived by any estate from any particular sewer. It is not based upon the peculiar and special benefits of each estate. *Butler* v. *Worcester*, 112 Mass. 541. *Workman* v. *Worcester*, 118 Mass. 168. *Sexton* v. *North Bridgewater*, 116 Mass. 200.

It is the intention of the statute that a landowner shall only receive such damages as he is entitled to, after deducting special benefits, and shall be liable to be assessed in common with other estates of the same class for his just and proportionate share of the whole expense for sewers and drains.

Exceptions overruled.

CHARLES L. GORHAM & another *vs.* RAPHAEL GROSS & another.

Worcester. Oct. 2, 1877. — Aug. 31, 1878. ENDICOTT & LORD, JJ., absent.

The owner of land, who makes a contract with a firm of masons, by which the latter are to furnish all the materials and labor in building a party wall, half on his land and half on the land of an adjoining owner, is liable in tort to such adjoining owner, after the wall has been completed and accepted, for an injury to his property by the fall of the wall, resulting from its defective and unsafe condition, whether owing to his own negligence or to that of the masons.

On the issue whether the owner of land in a city, who builds a party wall under an agreement with the adjoining owner, reciting that "any points respecting the same, which are not herein specifically provided for, shall be decided by the custom in regard to party walls in the said city," is bound to put flues therein for the use of such adjoining owner, an expert may be asked if party walls in that city are "usually constructed with flues for the accommodation of the adjacent estate."

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TORT for injuries by the falling of a party wall. After the decision reported 117 Mass. 442, the case was tried in this court, before *Morton*, J., who allowed a bill of exceptions in substance as follows:

On July 9, 1873, the plaintiffs and the defendants executed an indenture, the material parts of which were as follows: "Whereas the said Charles L. and Chester Gorham, and the said Gross and Strauss, are owners of certain adjoining parcels of land situated on the westerly side of Main Street in the said Worcester, between land of the People's Savings Bank on the north and land of Mrs. Mary H. E. Davis on the south, and whereas the said parties to these presents propose to erect buildings upon their respective premises, they do hereby covenant and agree, each with the other, for themselves, their heirs or assigns, that the wall between their said premises shall be what is known as a party wall, to wit: One half of the thickness of the wall shall be built upon land owned by each of the said parties to these presents, and, for the proper erection and maintenance of such party wall, the said parties do hereby give and grant each to the other, and to their heirs or assigns, all such rights and privileges in the premises and estates of each other as may be necessary for the fulfilment of this agreement in each and every particular thereof, subject to the restrictions and provisions hereinafter specified.

"It is hereby agreed that either or each party shall have the right at any time to build said party wall, or any part thereof, or to make additions thereto, by whomsoever such wall, or part, may have been previously built.

"And it is hereby agreed that the said party wall shall be built, constructed and maintained, in its several parts, and in any additions that may be made thereto, as follows:" to wit, of brick, with stone foundation, and in other respects as particularly described.

"The said party wall or any part thereof, which shall be built by one of the said parties to these presents, their heirs or assigns, shall be built to the satisfaction of the other party, their heirs or assigns, and the cost thereof shall be ascertained and agreed upon within a reasonable time after the building of such wall or part thereof, and either of the said parties, their heirs or

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assigns, desiring to use the said wall or a part thereof which has been built by the other party, their heirs or assigns, shall pay one half the costs of building the full thickness of the wall, for the whole of said wall in case they make use of the same, or a true proportional part of said cost, in case they use a part only of said wall.

"Each party to these presents hereby reserves the right to enter, use or improve said party wall, in such ways and for such purposes as party walls are usually constructed therefor, and it is hereby agreed that any points respecting the same, which are not herein specifically provided for, shall be decided by the custom in regard to party walls in the said city of Worcester."

On September 12, 1873, the defendants made a contract in writing with a firm of masons, by the terms of which the latter were "to furnish all materials and to perform or cause to be performed all labor in completing the granite and brick work, including setting of stone in brick work, and lathing and plastering," for a building, including the wall in question, to be erected for the defendants, "in strict conformity with the plans, specifications and detail drawings for the same furnished by, and under the superintendence and to the acceptance of, Frank W. Cherrington, architect;" the defendants were to pay them a gross sum, "seventy-five per cent. of the amount due at the close of each month for the labor and materials furnished during the month, and, upon the completion of the brick work, the full amount due therefor," and all extra work to be paid for as agreed upon by the defendants or their "agent, the architect."

The specifications set forth that "the aforesaid building is to be erected under the superintendence and to the acceptance of F. W. Cherrington, architect." Cherrington testified that the only superintendence of the building he exercised was to inspect the work, to see that the structure conformed to the specifications, and to give the contractors, on the completion of each month's work, a certificate that they were entitled to receive therefor the amount then due under the building contract, on the strength of which certificate the contractors drew their pay from the defendants.

It appeared that the wall in question was erected, one half its width on land of the plaintiffs and the other half on land of the

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defendants; that the plaintiffs' lot was occupied by a one-story wooden building used as a music shop and frequented by customers; and that at five o'clock in the morning of December 4, 1873, the wall fell, crushing this building and destroying its contents.

The plaintiffs offered evidence that the wall was complete up to the third story of the defendants' building, and that the floor of the fourth story had been laid; that the rear wall of the fourth story and the north wall which fell had been completed, except for a few feet from the front, which was left until the front, which was intended to be of a more ornamental character, should be built at a later time; that the south wall, about two thirds into which the trusses were built, was at its full height, and the rest nine feet high; that the side walls of the fourth story were ninety feet in length, twelve feet in height, and about fifty feet above the ground; that there were no stays or supports of any kind to the north wall, except two trusses which were for the support of the roof, and which had been put in by the carpenter with whom the defendants had contracted to do the wood work upon the building, which stretched across the building and were anchored into the north and south walls; that the wall which fell was blown over by the wind; that ordinary prudence required that it should have been secured by stays at intervals of about ten feet, and that, if so properly stayed, the accident would not have happened; that the attention of two or three persons was drawn a day or two beforehand to the dangerous condition of the wall, and one of them, an architect, called the attention of one of the contractors to the danger; and that the defendants passed the building daily and were in it frequently, and Cherrington, their architect, was daily about the building, and that they and he had means of knowing and preventing the danger.

The defendants contended, and offered evidence tending to show, that the wall was built when the weather was extremely cold, the thermometer being below zero, so that the mortar froze as soon as laid; that there came suddenly a day and night of very warm weather, which softened the mortar and destroyed its tenacity, so that it could not support the weight of the bricks, and the wall was thereby crushed; that the night was still; and

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that no braces or stays, or other reasonable precaution, would have prevented the accident, which could not have been foreseen or expected.

The plaintiffs contended that, if the defendants' theory as to the cause of the accident was correct, the defendants were guilty of negligence in building the wall in such extremely cold weather.

Both the defendants and the contractors who had charge of the work testified that the defendants in no way exerted any control over the contractors, or gave any directions as to the construction of the building. It appeared that the wood work upon the building was going on at the same time with the construction of the brick work; that the carpenters had laid the floors of the different stories, including that of the fourth story, and had inserted in the north wall two trusses, which were part of the structure intended to support the roof; and that the firm of masons had done under their contract everything which they were required thereby to do to that portion of the north wall extending from the part left to receive the front wall, and the architect had surveyed and estimated the work on the north wall, and given a certificate therefor on December 1. There was evidence that some work was done on the wall by the masons after December 1.

The defendants contended that, after the commencement of the party wall, five flues were built therein at the request of and for the accommodation of the plaintiffs, and were put in under a special arrangement with the contractors, as the defendants refused to cause them to be put in, on the ground that they were not bound so to do under the indenture. It was a matter of serious controversy in the case, whether the insertion of these flues weakened the wall and contributed to cause its fall; and, in connection with that controversy, the plaintiffs contended that, under the indenture, the defendants were bound to put in these flues according to the "custom in regard to party walls in said city of Worcester." This the defendants denied. The plaintiffs put to a witness called by them, and who was admitted to be an expert in such matters, the question, "Are party walls in Worcester usually constructed with flues for the accommodation of the adjacent estate?" To this question the defendants objected, on the

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ground that its answer affirmatively would not be proper proof of a custom such as was intended in the indenture. The judge ruled that the indenture did not require proof of a technical custom, and permitted the question to be answered. The witness answered affirmatively.

The defendants asked the judge to rule that, on the evidence as to the relation of contractors and contractees existing between the defendants and the firm of masons, the plaintiffs were not entitled to recover against the defendants. The judge refused so to rule, but instructed the jury that if the plaintiffs had proved that the accident was caused by such negligence as they contended, the defendants would be liable, notwithstanding such negligence was the negligence of the firm of masons in executing their contract. The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

W. S. B. Hopkins, for the defendants.

G. F. Hoar & T. L. Nelson, for the plaintiffs.

GRAY, C. J. By the indenture between the plaintiffs and the defendants, either party was authorized to build a party wall of brick with stone foundation, half on the land of each, and half the cost of which should be paid by the other if he used it. The defendants made a contract with a firm of masons, by which the latter were to furnish all the materials and labor in completing the stone and brick work, lathing and plastering, according to the plans and specifications and under the superintendence and to the acceptance of an architect, who was called in this contract and was in fact the agent of the defendants. The masons built the party wall, ninety feet long and fifty feet high, and did everything that they were required by their contract to do to it; the architect surveyed and estimated the work, and gave them a certificate therefor, which, by the contract, entitled them to receive three fourths of the amount already due them, under the contract, for labor and materials; and carpenters employed by the defendants put in the timbers of the floors and some of those required to support the roof. After the wall had been so completed by the masons and accepted by the defendants, it fell, and crushed the building and property upon the adjoining lot of the plaintiffs.

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There was evidence tending to show that the fall of the wall was occasioned by negligence in building it without sufficient stays or supports, or in building it in such cold weather that the mortar froze as soon as laid and was afterwards softened by a sudden thaw. The jury were instructed that if the accident was caused by such negligence, the defendants would be liable, although it was the negligence of the masons in executing their contract. We are of opinion that this instruction was sufficiently favorable to the defendants.

The general rule of law, stated by Mr. Justice Blackburn in delivering the unanimous judgment of the Court of Exchequer Chamber, in *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 279, affirmed by Lord Cairns and Lord Cranworth in the House of Lords in the same case, L. R. 3 H. L. 330, 339, 340, and approved by this court in *Shipley* v. *Fifty Associates*, 106 Mass. 194, 198, is that "the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape."

This rule has been applied to dangerous animals; 1 Hale P. C. 430; *Cox* v. *Burbridge*, 13 C. B. (N. S.) 430; to cesspools; *Tenant* v. *Goldwin*, 1 Salk. 21, 360; *S. C.* 2 Ld. Raym. 1089, and 6 Mod. 311; *Ball* v. *Nye*, 99 Mass. 582; to artificial reservoirs of water; *Fletcher* v. *Rylands*, above cited; *Gray* v. *Harris*, 107 Mass. 492; and to accumulations of snow and ice upon a building by reason of the form of its roof; *Shipley* v. *Fifty Associates*, above cited.

The only exceptions to the liability, which have been judicially recognized, are in case of the plaintiff's own fault, or of *vis major*, the act of God, or the acts of third persons, which the owner had no reason to anticipate. *Fletcher* v. *Rylands*, L. R. 1 Ex. 280, and L. R. 3 H. L. 340. *Nichols* v. *Marsland*, L. R. 10 Ex. 255, and 2 Ex. D. 1. *Humphries* v. *Cousins*, 2 C. P. D. 239. *Mahoney* v. *Libbey*, 123 Mass. 20. In *Fletcher* v. *Rylands*, it was found, in the case stated, that "for the selection of the site, and for the planning and construction of the reservoir, it was necessary that the defendants should employ an engineer and contractors; and they did for those purposes employ a com-

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petent engineer and competent contractors, by whom the site was selected, and the reservoir planned and constructed; on the part of the defendants themselves, there was no personal negligence or default whatever; but reasonable and proper care and skill were not exercised by the persons they employed, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear." And it was unavailingly argued by Mr. (afterwards Lord Justice) Mellish, that the defendants were not liable for the negligence of contractors employed by them. L. R. 1 Ex. 268, 269, 276.

An owner of land has the same duty to keep on his own land a house or wall built thereon, as the filth in his cesspool, or the water in his reservoir, or the snow and ice upon his roof. His duty is, in the words of Baron Parke, "to keep it in such a state that his neighbor may not be injured by its fall." *Chauntler* v. *Robinson*, 4 Exch. 163, 170.

In *Nichols* v. *Marsland*, Baron Bramwell said: "What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not." "I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell." L. R. 10 Ex. 259, 260. See also *Tarry* v. *Ashton*, 1 Q. B. D. 314; *Bower* v. *Peate*, 1 Q. B. D. 321; *Gray* v. *Boston Gas Light Co.* 114 Mass. 149.

The present case does not require us to decide whether it is more accurate to say that it is not a question of negligence and that the defendant is liable even in case of latent defect; or to say that the fall of the wall, in the absence of proof of inevitable accident or of the wrongful act of third persons, is sufficient evidence of negligence. See *Ball* v. *Nye*, and *Shipley* v. *Fifty Associates*, above cited; *Kearney* v. *London & Brighton Railway*, L. R. 5 Q. B. 411, and L. R. 6 Q. B. 759; *Mullen* v. *St. John*, 57 N. Y. 567. As was well observed by Mr. Justice Lush, in

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Tarry v. *Ashton*, negligence is a relative term, depending upon the question, What is the duty of the defendant? 1 Q. B. D. 318. In the case at bar, the jury, under the instructions given, must have found negligence, either in the defendants themselves or in the masons employed by them to build the wall.

Assuming that the relation of the masons to the defendants was that of contractors, the former alone would be responsible to a third person for any injury caused by their negligence in a matter collateral to the contract, as, for instance, in depositing materials, handling tools, or constructing temporary safeguards, while doing the work; but where the very thing contracted to be done is improperly done, and causes the mischief upon the land of another, the employer is responsible for it, at least when it occurs after the structure has been completed to his acceptance. *Fletcher* v. *Rylands*, above cited. *Hole* v. *Sittingbourne & Sheerness Railway*, 6 H. & N. 488, 500. *Butler* v. *Hunter*, 7 H. & N. 826, 833. *Hilliard* v. *Richardson*, 3 Gray, 349, 353. *Chicago* v. *Robbins*, 2 Black, 418, 428. *Conners* v. *Hennessey*, 112 Mass. 96. *Boswell* v. *Laird*, 8 Cal. 469, 498.

The whole wall, when completed and accepted, was, by virtue of the indenture between the defendants and the plaintiffs, owned by the defendants until they should be reimbursed half the cost of it by the plaintiffs. *Richardson* v. *Tobey*, 121 Mass. 457. For the injury caused to property on the adjoining land by the falling of this wall, by reason of its defective and unsafe condition, whether owing to their own negligence or to that of the masons who had built it, the defendants are responsible.

The evidence objected to was rightly admitted. The indenture between the parties, in referring to "the custom in regard to party walls in the city of Worcester," evidently had in view not a technical custom, but the usual practice, like the previous clause in the same paragraph, which speaks of the ways and purposes in and for which "party walls are usually constructed."

Exceptions overruled.

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JOSEPH H. WALKER & another *vs.* JAMES W. BROOKS & another.

Worcester. Oct. 5, 1877. — Aug. 31, 1878. ENDICOTT & LORD, JJ., absent.

A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy.

A bill in equity, by A. and B., copartners, against C. and D., alleged that D. executed to A. and B. a license to use a patented machine, for which they were to pay him certain license fees on rendering true monthly accounts; that at the same time D. made an agreement with A. to pay him for his services, (which he performed,) in introducing the machine to the public, a sum equal to such license fees; that D. had assigned his rights in the license and agreement to C., and A. had assigned his rights under the agreement to A. and B. as copartners; that A. and B. had used the machine, duly rendered accounts to C. and D., paid them therefor a certain sum, and owed and were ready to pay to C. a further sum therefor; that a like sum was due from C. to A. and B.; that A. and B. had demanded of C. that he should pay to them the sum so paid by them, and should set off such further sum due to him against the sum so in equity due to them from him; and that C. wholly refused to do so, and threatened to sue them for the further sum due and to set aside and avoid the lease and license, and to seize upon and take possession of the leased machine. The prayer of the bill was for a discovery under oath; for an account of all sums due from A. and B. to C. and D. or either of them, and from C. and D. or either of them to A. and B.; for a set-off of such sums against each other; for an injunction against bringing any suit against A. and B. on account of any claim against them as above stated; and for further relief. *Held*, on demurrer, that the bill could not be maintained, either on the ground of set-off, or for an account, or for relief against forfeiture, or to reach, under the Gen. Sts. c. 113, § 2, property not attachable at law, or for discovery.

GRAY, C. J. This bill was filed May 21, 1877, by Joseph H. Walker and George M. Walker, copartners, against James W. Brooks and Horace H. Bigelow. The material allegations of the bill are as follows:

1st. That on March 21, 1872, the defendant Bigelow executed to the two plaintiffs a lease of and license to use a certain patented machine for compressing heels for boots and shoes, for which the plaintiffs were to pay him a royalty of ten cents, or, in case of their rendering true accounts to him monthly, the sum of one half cent, for each pair of heels thereby compressed.

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2d. That, at the same date, Bigelow entered into an agreement with Joseph H. Walker, one of the plaintiffs, to pay him monthly for certain services in introducing the machine to the public (which he afterwards performed) sums equal to those to be paid by the plaintiffs to Bigelow under the lease and license from him.

3d. That Bigelow has assigned each of these contracts to the other defendant Brooks, who has become in equity entitled to all the advantages thereof and to receive all sums of money due or to become due from the plaintiffs under the same, and has become in equity bound to perform all the obligations expressed or implied therein to be performed by Bigelow.

4th. That all the rights and obligations of Joseph H. Walker, under his agreement with Bigelow, have been assigned to and vested in the plaintiffs, and they are in equity entitled to receive all sums which are or may become due under the same.

5th. That the plaintiffs, under the lease and license to them, have used the patented machine, and have duly kept and rendered accounts to the defendants, and have paid to them in full for such lease and use to February 1, 1877, the sum of $3000, and now owe and are ready to pay to the defendant Brooks a further sum of $164.75 for such use since that time.

6th. That there is due a like sum from Brooks to the plaintiffs, and that they have demanded of him that he should pay to them the sum so paid by them, and should set off the sum so due from them as rent as aforesaid against the sum so in equity due to them from him; and that he has wholly refused to do so, and threatens to sue them for this sum, and to set aside and avoid the lease and license, and to seize upon and take possession of the leased machines, alleging that the plaintiffs have not performed the stipulations and conditions thereof on their part.

7th. That the plaintiffs have fully performed the same, and are ready and offer to do so hereafter, except that they insist and aver that in equity they are entitled to have the sums due as aforesaid, from either of the parties to the other, set off, and that such right to a set-off operates as an extinguishment and payment of those sums.

The prayer of the bill is for a discovery under oath; for an account of all sums due from the plaintiffs to the defendants or

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either of them, and from the defendants or either of them to the plaintiffs; for a set-off of such sums against each other; for an injunction against bringing any suit against the plaintiffs on account of any claim against them as above stated; and for further relief.

To this bill the defendants have demurred, because the plaintiffs have a plain, adequate and complete remedy at law, and because they have not stated such a case as entitles them to any discovery or relief in equity. We are of opinion that the demurrer is well taken, and that the bill cannot be sustained on any of the grounds assigned by the learned counsel for the plaintiffs.

It is attempted, in the first place, to bring the case within the rule, that where there are cross demands between the parties of such a nature that if both were recoverable at law they would be the subject of a set-off, then, if either of them is a matter of equitable jurisdiction, the set-off may be enforced in equity. It is said that the defendant Brooks, as the assignee of the claim of the other defendant Bigelow against the plaintiffs, has an equitable right of action against the plaintiffs, which, though at law it could only be sued in the name of Bigelow, might in equity be sued by Brooks; and that such right of Brooks to sue the plaintiffs in equity affords a foundation for jurisdiction in equity to order a set-off of that equitable right against the plaintiffs' claim.

But a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy.

In *Hammond* v. *Messenger*, 9 Sim. 327, 332, Vice Chancellor Shadwell so held, and said, "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained, from certain persons to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that,

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if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

It is true that Mr. Justice Story, in his Commentaries, observed upon that opinion, "This doctrine is apparently new, at least in the broad extent in which it is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has) there a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title. A *cestui que trust* may ordinarily sue third persons in a court of equity, upon his equitable title, without any reference to the existence of a legal title in his trustee, which may be enforced at law." Story Eq. Jur. § 1057 *a*. To the same effect is the statement in Story Eq. Pl. § 153.

But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of *Hammond* v. *Messenger* is amply sustained by earlier authorities in England and in this country.

A century and a half ago, parties for whose benefit their agent had obtained policies of insurance in his own name, brought bills in equity against the underwriters. But Lord Chancellor King refused to sustain them, saying, "At this rate, all policies of insurance would be tried in this court, for they are generally taken in the name of a trustee;" and again, "If I should give way to this attempt, no action would ever be brought on a

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policy." And his decision was affirmed in the House of Lords. *Dhegetoft* v. *London Assurance Co.* Mosely, 83, and 4 Bro. P. C. (2d. ed.) 436. *Fall* v. *Chambers*, Mosely, 193. Lord Hardwicke afterwards expressed a like opinion. *Motteux* v. *London Assurance Co.* 1 Atk. 545, 547.

In *Cator* v. *Burke*, 1 Bro. Ch. 434, Cator, with whom Hargrave had deposited, as security for a debt of his own to Cator, a bond made by Burke to Hargrave, filed a bill in equity against Burke and Hargrave, to compel Burke to pay the debt to the plaintiff, out of a counter bond for a larger amount, which Hargrave had made to Burke; and to prevent Burke from setting up the counter bond as a defence to any action at law which might be brought against him in the name of Hargrave. The bill was dismissed; Lord Loughborough saying, "The bond can never be considered in any other light than as an unassignable security; to consider it otherwise would bring all the causes on bonds in Westminster Hall into this court. The plaintiff has mistaken both the law and equity; for first, he has supposed that the holder of a bond might, where there was no discovery to be made, come hither, and have a different relief from what he could have at law; and secondly, that if there was fraud in giving the counter bond, it could not be made use of at law. When this bill is dismissed with costs, you may bring your action in the name of Hargrave. If this bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that is given." So in *Rose* v. *Clarke*, 1 Yo. & Col. Ch. 534, 548, Vice Chancellor Knight Bruce said, "As I apprehend, an equitable title to money secured by a bond is not of itself sufficient to entitle the party so interested to sue the obligor in equity for payment of the money. There must, I conceive, be something more."

The decision in *Riddle* v. *Mandeville*, 5 Cranch, 322, allowing an indorsee of a promissory note to sustain a bill in equity against a remote indorser, proceeded upon the ground that in Virginia no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that in that particular case the intermediate party was insolvent. See *Mandeville* v. *Riddle*, 1 Cranch, 290; *Harris* v. *Johnston*, 3 Cranch, 311. That Chief

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Justice Marshall, who delivered the opinions in these cases, did not consider them as establishing the general proposition that the assignee of a chose in action, who could not sue thereon in his own name at law, might therefore do so in equity, is manifest from his opinion in the later case of *Lenox* v. *Roberts*, 2 Wheat. 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "as the act of incorporation had expired, no action could be maintained at law by the bank itself."

In *Carter* v. *United Ins. Co.* 1 Johns. Ch. 463, Chancellor Kent dismissed a bill in equity brought against an insurance company by the assignees of a policy of insurance; and briefly stated his reasons to be, that the demand was properly cognizable at law, and there was no good reason for coming into the court of chancery to recover on the contract of insurance; that the plaintiffs were entitled to make use of the names of the original assured in the suit at law, and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action; that it might be said here, as was said by the Chancellor in the analogous case of *Dhegetoft* v. *London Assurance Co.* above referred to, that at this rate all policies of insurance would be tried in this court; and that the bill stated no special ground for equitable relief.

It was held by the Courts of Appeals of Maryland and Virginia, and by the Supreme Court of Tennessee in an opinion delivered by Judge Catron, (afterwards a justice of the Supreme Court of the United States,) that the mere fact of the assignment of a legal chose in action gave the assignee no right to invoke the jurisdiction of a court of equity. *Adair* v. *Winchester*, 7 Gill & Johns. 114. *Moseley* v. *Boush*, 4 Rand. 392. *Smiley* v. *Bell*, Mart. & Yerg. 378. The opposing decision in *Townsend* v. *Carpenter*, 11 Ohio, 21, is unsupported by any reference to authorities.

The cases before Chancellor Walworth, of *Field* v. *Maghee*, 5 Paige, 539, and *Rogers* v. *Trader's Ins. Co.* 6 Paige, 583, contain no decision upon this point; and in the later case of *Ontario Bank* v. *Mumford*, 2 Barb. Ch. 596, 615, he said, "As a general

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rule, this court will not entertain a suit brought by the assignee of a debt or of a chose in action, which is a mere legal demand, but will leave him to his remedy at law by a suit in the name of the assignor;" and referred to the cases before Chancellor Kent and Vice Chancellor Shadwell, and in the courts of Maryland, Virginia and Tennessee, already cited.

The statement in Story Eq. Jur. § 1436 *a*, that "if a legal debt is due to the plaintiff by the defendant, and the defendant is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set off the one against the other, if both debts could properly be the subject of a set-off at law," is pervaded by the same error that we have considered.

The decision of the Vice Chancellor in *Williams* v. *Davies*, 2 Sim. 461, by which a creditor appears to have been restrained in equity from taking judgment and execution at law on a debt of one to whom he owed a larger sum; is obscurely reported, and was disapproved by Lord Chancellor Cottenham. *Clark* v. *Cort*, Cr. & Phil. 154, 159. *Rawson* v. *Samuel*, Cr. & Phil. 161, 178. In *Clark* v. *Cort*, the bill upon which the set-off was ordered was by the assignees of a claim which required the investigation of accounts and the application of a security, of which the court would have had jurisdiction if the suit had been by the assignor; and the Chancellor said, "The case, then, is not that of a mere assignee of a legal debt, coming into equity to have the benefit of a set-off which he could not have at law." In *Rawson* v. *Samuel*, he observed, "We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient." And see *Watson* v. *Mid Wales Railway*, L. R. 2 C. P. 593; *Spaulding* v. *Backus*, 122 Mass. 553.

In this Commonwealth, the assignee of a chose in action has an adequate and complete remedy at law, in the right to maintain an action thereon in the name of his assignor, or of his executor or administrator, without his consent, and even against his protest, at least upon giving him, if seasonably demanded, a

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bond of indemnity against costs. *Dennis* v. *Twitchell*, 10 Met. 180, 184. *Rockwood* v. *Brown*, 1 Gray, 261. *Bates* v. *Kempton*, 7 Gray, 382. *Foss* v. *Lowell Savings Bank*, 111 Mass. 285. In any action at law, brought by Brooks in the name of Bigelow, to recover the sums due him from these two plaintiffs under the license, they could set off the demand, under the other contract assigned to them, of Joseph H. Walker against Bigelow, if Bigelow had notice of such assignment before bringing his action. Gen. Sts. *c.* 130, § 5. *Cook* v. *Mills*, 5 Allen, 36, 38. Their neglect to give such notice cannot entitle them to demand the interposition of a court of equity. *Wolcott* v. *Jones*, 4 Allen, 367.

The bill shows no case for an account that cannot be taken at law. *Badger* v. *McNamara*, 123 Mass. 117. It cannot be maintained to restrain a forfeiture; because it does not show that here is any danger of irreparable injury, therein differing from *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 110 Mass. 1. It cannot be maintained under the Gen. Sts. *c.* 113, § 2, to reach and apply, in payment of a debt, property or rights of a debtor which cannot be come at to be attached or taken on execution in a suit at law against him; because it is not framed in that aspect, and because the statute relates to rights of property, or claims of the debtor against third persons, and does not extend to claims of the debtor against the plaintiff himself. *Crompton* v. *Anthony*, 13 Allen, 33, 37. It cannot be maintained for discovery; because it cannot be maintained for relief, and does not show that any discovery is required in aid of proceedings at law. *Pool* v. *Lloyd*, 5 Met. 525. *Ahrend* v. *Odiorne*, 118 Mass. 261.

Demurrer sustained, and bill dismissed.

J. J. Storrow, for the defendants.

G. F. Hoar, (*F. T. Blackmer* with him,) for the plaintiffs.

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ELMER LINCOLN *vs.* OLIVER S. WILBUR.

Bristol. Oct. 24, 1877. — Aug. 31, 1878. LORD & SOULE, JJ., absent.

Under the U. S. St. of June 22, 1874, § 12, knowledge, on the part of a purchaser, that the sale was in fraud of the seller's other creditors, is necessary to set aside the sale as to him.

On the issue whether a sale made by a person within four months of his bankruptcy was in fraud of his creditors, evidence of what he said, after the sale, and without the knowledge of the purchaser, as to the disposition of his property, and mortgages subsequently made by him, not shown to be connected with such sale or parts of a general scheme to defraud, are inadmissible, as against the purchaser.

On the issue whether a sale was in fraud of the creditors of a person, who within four months thereafter was adjudged a bankrupt, the purchaser may be asked by his counsel if he knew at the time of the sale that the seller had a fraudulent purpose to make a preference, or was contemplating bankruptcy.

TORT, by the assignee in bankruptcy of Cyrus Leonard, for the conversion of a cow and a yoke of oxen. Writ dated November 27, 1876. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

On November 16, 1875, Leonard sold the cattle in question to the defendant, and delivered them to him the next morning. It was admitted that Leonard was insolvent at the time of the sale, and was, on March 3, 1876, adjudged a bankrupt, on his own petition. The plaintiff contended that the sale was in fraud of the bankrupt act.

Leonard, who was called as a witness by the plaintiff, was asked what conversation he had with the plaintiff, after the delivery of the cattle on November 17, 1875, with reference to his property, or the disposition he had made of it. The defendant objected, and the judge excluded the evidence.

The plaintiff then offered in evidence certain mortgages of personal property executed by Leonard to third persons on November 18, 1875. It appeared that all the property Leonard had on November 15, 1875, not exempt from attachment, was the property conveyed to the defendant and the property described in these mortgages, and that the value of the whole property was about $800. It also appeared that, at the time of the sale to the defendant, Leonard was indebted to different persons, to an amount above $2000. The mortgages offered in evidence were excluded.

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The plaintiff called Lyman Wilbur, who testified, among other things, as follows: "I had a talk with the defendant, within a day or two after November 18, 1875. The defendant asked me if I had heard anything from Lincoln, referring to the plaintiff; I said 'No.' He then asked if Leonard owed my son. I told him that he did; he asked how much; I told him about $280. Wilbur then said, 'Leonard is too smart for Lincoln; will Lincoln sue Leonard? If Lincoln sues Leonard, he will go into chancery.' He asked me what Leonard had given my son for security. I told him, as far as I could remember. At another time he said Lincoln would not get much, but the other creditors would get their pay. At another time, after the bankruptcy, he came to my house and asked my son to sign to give Leonard his discharge in bankruptcy; he spoke about Leonard's going into bankruptcy. I told him I did not think it was right that some should get all their pay and others nothing. I asked him how he could make it out that he could put in a claim for $100, when he had received $120. He said he could put in other things to make it $100." There was no evidence, by either party, as to whether the defendant had met Leonard between the time when the defendant had received the cattle of Leonard and the date of the first talk with Lyman Wilbur. The plaintiff offered evidence tending to show that Cyrus Leonard's financial reputation for a year previous to the sale to the defendant was bad, and it appeared that for some years previous he was slow pay, and that his financial reputation had continued about the same. The plaintiff again offered the mortgages in evidence; but the judge excluded them.

The defendant was asked by his counsel, "Did you know at the time of the sale that Leonard had a fraudulent purpose to make a preference under the bankrupt laws, or that he was contemplating bankruptcy?" The judge ruled, against the plaintiff's objection, that the question was competent, and the defendant answered that he did not. The defendant also testified that he lent Leonard $165 for thirty days on October 16, 1875, and that on November 16, 1875, he called on Leonard for payment; that Leonard said he had no money on hand, but had some cattle which he was intending to sell to raise the money, and would like to sell them to him, and thereupon the sale in question was made.

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The plaintiff again offered the mortgages in evidence; but the judge refused to admit them.

The plaintiff asked the judge to rule as follows: "1. It is immaterial what was the defendant's belief as to the intention of Leonard in making the sale. 2. If the defendant had reasonable cause to believe that Leonard made the sale in contemplation of insolvency, that is, with a view or under expectation of petitioning for the benefit of the bankrupt act, then such sale was void and the plaintiff can recover. 3. A transfer within four months of filing the petition by the bankrupt, with a view to prevent the property from being equally distributed among all the creditors, is a transfer in fraud of the bankrupt laws of the United States; and if the defendant had reasonable cause to believe that Leonard was at the time of the transfer insolvent, then he is presumed to know that it was a transfer in fraud of the bankrupt laws of the United States."

The judge refused so to rule; but instructed the jury that the plaintiff, to maintain the action, must prove that, on the day the cattle were delivered by Leonard to the defendant, Leonard was then insolvent in fact, or contemplated becoming so; that the sale and delivery were with a view to give a preference to the defendant as his creditor; that the defendant then had reasonable cause of belief that Leonard was insolvent; and that the defendant knew that such sale was made by Leonard in fraud of the bankrupt law, *i. e.* so as to evade or defeat the operation of the bankrupt law.

The judge, at the request of the plaintiff, also instructed the jury as follows: "The fraudulent intent, with a view to give a preference, extends to a sale made with an intent to give one creditor any advantage over others in respect of payment or security of his debt. Evidence of the debtor's financial condition and reputation a year before his going into bankruptcy is competent to show what means the defendant had to know or cause to believe that he was insolvent during the year following. It is immaterial whether the defendant in fact did believe that Leonard was insolvent or not. If the sale to the defendant was out of the usual and ordinary course of business, it is *primâ facie* evidence of the fraudulent intent of the parties."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

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C. A. Reed, for the plaintiff.

W. H. Fox, for the defendant.

AMES, J. In order to impeach and set aside a conveyance of property by an insolvent person, as a fraudulent preference of a creditor in violation of the provisions of the United States bankrupt law, it is necessary, as the law now stands, for the assignee of the bankrupt to prove, among other things, that the debtor was insolvent or in contemplation of insolvency, and that the grantee or person to be benefited by the conveyance had reasonable cause to believe the debtor to be insolvent, and knew that the conveyance was made in fraud of the bankrupt act. U. S. St. June 22, 1874, § 12. Until June 22, 1874, it was sufficient to prove, against the grantee or preferred creditor, that he had "reasonable cause to believe" that the conveyance was made in fraud of the statute. U. S. Rev. Sts. § 5128. It is impossible to believe that the change introduced in the more recent statute was intended as a mere verbal alteration. It is well said by Dillon, J., in *Singer* v. *Sloan*, 3 Dillon, 110, that if these two forms of expression are in contemplation of law identical, then the change of the statute meant nothing and accomplished nothing; and that "where reasonable cause to believe that a fraud on the act was intended was before sufficient, knowledge of that fact is now required." We have had occasion to decide, in *Carroll* v. *Hayward*, 124 Mass. 120, that reasonable cause to know, although it is evidence tending to prove knowledge, is not identical with actual knowledge. "Reasonable cause to believe" is certainly entitled to no greater weight. The court could not have ruled as the plaintiff requested, without giving the jury to understand that something short of actual knowledge would be sufficient to make out this element in the plaintiff's case. *Tryon* v. *Whitmarsh*, 1 Met. 1. *Pearson* v. *Howe*, 1 Allen, 207.

The bankrupt was called by the plaintiff as a witness, and of course it was competent for the plaintiff to examine him fully as to the disposition of his property, and as to his purpose and design in the arrangements which he had made and carried out. But with regard to his testimony as to a conversation with the plaintiff on that subject, the day after the conveyance, the defendant not being present or having any knowledge of it, we see no ground on which it could have been admitted.

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As to the mortgages which he subsequently made to other parties not shown to be connected with the defendant, we find nothing in the facts stated in the bill of exceptions which shows that the presiding judge was bound to rule, as a matter of law, that they and the conveyance to the defendant were parts of one general scheme, or that they had such a connection with each other as to bring them within the rule laid down in *Jordan* v. *Osgood*, 109 Mass. 457, and *Lynde* v. *McGregor*, 13 Allen, 172, 180. We cannot say therefore that there was any error in holding that the general rule should be applied, namely, that the title of a purchaser is not to be impeached by any subsequent act or declaration of the vendor. *Bridge* v. *Eggleston*, 14 Mass. 245, 250. *Taylor* v. *Robinson*, 2 Allen, 562. *Horrigan* v. *Wright*, 4 Allen, 514. *Holbrook* v. *Holbrook*, 113 Mass. 74.

As the question of the defendant's knowledge of Leonard's purpose in making the conveyance was directly raised by the case, it was of course proper to ask the defendant whether he knew that Leonard intended a fraud upon the bankrupt law when he made the conveyance.

The result is, that we find no error in the rulings and instructions at the trial, and therefore the

Exceptions are overruled.

EDWIN S. THAYER & others *vs.* NEW BEDFORD RAILROAD COMPANY.

Bristol. Jan. 28. — Aug. 31, 1878. ENDICOTT & SOULE, JJ., absent.

A person cannot, by any use of a navigable dock, gain such a right of way therein as will enable him to maintain a claim for damages for its obstruction by a railroad built across it on piles without a draw, whereby vessels are prevented from coming up to his own private dock and wharf.

PETITION to the county commissioners for a jury to assess damages occasioned to "certain real estate, easements and privileges" in New Bedford, by the location and construction of its railroad by the respondent.

At the trial before a sheriff's jury, it appeared that the petitioners' property was included between the letters A, B, C and

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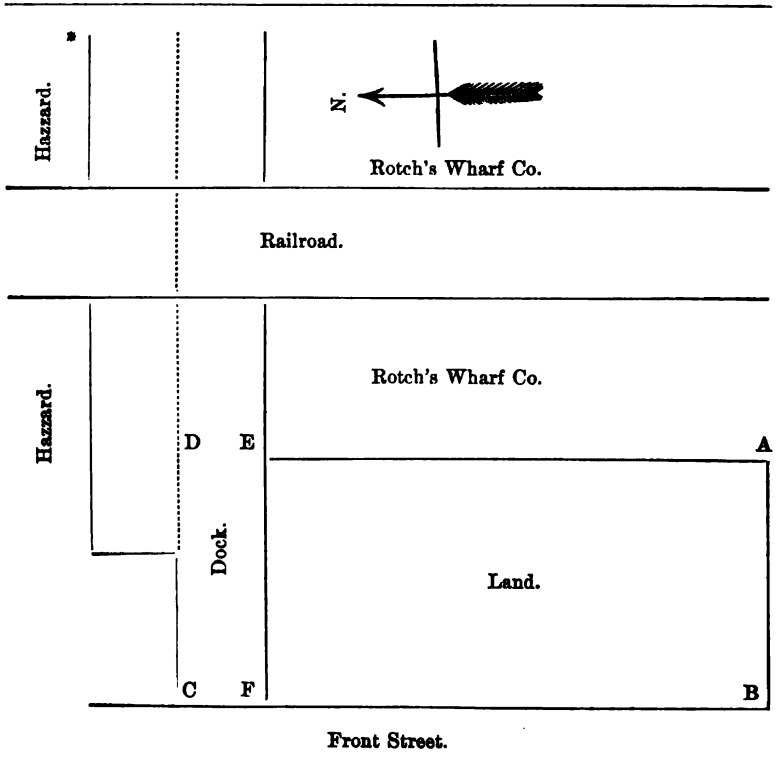
D on the plan, a copy of which is printed in the margin,* and was between Clark's Point and the head of navigation on the Acushnet River, in New Bedford, and west of the channel. The petitioners' dock is the space included between the letters C, D, E, F. The dotted line represents the centre of the dock, which extends to the open water of the river, and the dotted line through the centre of the dock east of D represents the boundary line between the property of Rotch's Wharf Company and that of one Hazzard.

On June 8, 1873, the railroad, as shown on the plan, was built by the respondent, by authority of law, on piles, and in such a manner as to cut off all access by water to the petitioners' wharf and dock, which was navigable water, and had been used for more than forty years, before such obstruction, for vessels to come and go there and land and take merchandise upon and from the petitioners' wharf, south of the west part of the dock.



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The petitioners contended that by long, adverse, continuous and public use, and under claim of right, exceeding twenty years, they had acquired a right of way and passage through the easterly docks to their dock and wharf, and that they had a right in law to recover damages for the obstruction by the respondent. They offered evidence tending to show such use of the docks by them, and the evidence was admitted against the respondent's objection.

The petitioners also put in evidence the Sts. of 1806, *c.* 18,* and 1831, *c.* 88; † and a deed of William Rotch, Jr., and others to the Rotch's Wharf Company.‡

The respondent asked the sheriff to rule that the claim of the petitioners that the dock in question, and the docks between it and the open river, were private property, under the provisions of the statutes and deed above referred to, and were not, by force of the statutes, public navigable waters, was not jus-

* This act, which is printed in full in 108 Mass. 209, authorizes, in the first section, the owners and proprietors of lots of land adjoining Acushnet River, in New Bedford, between Clark's Point and the head of navigation in that river, and their heirs and assigns, to erect, continue and maintain wharves parallel with the lines of their several lots, as they abut upon said river; and to extend the wharves to the channel of the river, if the owners of such lots think proper; and to provide docks, or erect wharves, on the extended portion of the lots, in such way and manner as the owner of each lot may think proper, not exceeding the limits of the channel of said river. The second section reserves the right to the Legislature to make such provisions respecting the navigation of the river, and the right of taking fish, as it may think the public interest requires, if it appears to the satisfaction of the Legislature that the erection or continuance of the wharves or docks operates any obstruction to the right of navigation of the river or the right of taking fish therein.

† This act, approved March 15, 1831, incorporated the Rotch's Wharf Company. Section 2 provides, "That said corporation be, and hereby is, declared and made capable to have, hold and possess the following described real estate." [Then follows a description of the property by metes and bounds, which included the land east of the petitioners' land, and also the dock south of the dotted line and east of the petitioners' dock.] "And the said corporation shall have power to sell, grant and convey, in fee simple or otherwise, their corporate property, or any part thereof, and lease, manage and improve the same, according to the will and pleasure of said corporation, expressed at any legal meeting."

‡ This was a deed of quitclaim, dated August 20, 1831, of the premises described in the above statute.

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tified in law; and that the petitioners could not recover damages.

The sheriff refused to give this instruction; and the jury returned a verdict for the petitioners in the sum of $3245. The Superior Court accepted the verdict; and the respondent appealed to this court.

G. Marston & C. W. Clifford, for the respondent.

T. M. Stetson, for the petitioners. The evidence in this case showed that, from the petitioners' dock to the channel of the river, there was a dock, the title to which, as well as the title to the wharves themselves, was, by virtue of the Sts. of 1806, *c.* 18, and 1831, *c.* 88, and by grant, in private persons and a corporation; that, as against such owners, the petitioner had acquired a right of way, by adverse use for over twenty years, to their dock; and that this right was interfered with by the respondent by the right of eminent domain.

It is well settled that a title to flats below high-water mark may be acquired by grant or by adverse possession. *Nichols* v. *Boston*, 98 Mass. 39. *Haskell* v. *New Bedford*, 108 Mass. 208. *Tufts* v. *Charlestown*, 117 Mass. 401. The evidence objected to tended to show such adverse possession in the petitioners; and nothing appears to render it incompetent. That it was inadmissible cannot therefore be asserted as a matter of law. *Putnam* v. *Bowker*, 11 Cush. 542. The certificate of the sheriff does not undertake to set out all the evidence of the private nature of the dock; it does not state the details of the evidence, such as the forcible removal of spars, jib-booms and of vessels loading in this private dock. Upon all questions of fact, the finding of the jury is conclusive. The fact that the dock was navigable is immaterial. Every dock, whether public or private, is navigable; but this fact does not make it the less private property, if it is otherwise so.

LORD, J. When the facts upon which the petitioners rely are understood, we do not apprehend that there is any difficulty in arriving at a correct result. No land of the petitioners was taken by the respondent. The petitioners own a dock, and, as we assume, the land described in the petition; and the railroad is constructed at a distance from the petitioners' property, not stated; the plan accompanying the papers having no scale upon

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it, that distance is not made known. The land between the petitioners' dock and the railroad is covered by navigable water. In that land the petitioners have and claim no interest or estate. Access to the petitioners' dock from any point beyond the railroad, which is built upon piles, without a draw, is prevented by the railroad.

The claim of the petitioners is that they have a private right of way, for boats and vessels, over and through such navigable water, from some place beyond the railroad to their dock. We are not aware that there is any such estate known to the law of Massachusetts. Each individual, as one of the general public, has a right to use navigable waters with his boats and vessels at pleasure, but it is in the exercise of a public, and not of a private right. He cannot thereby acquire a private right; for his use cannot, in law, be adverse. Navigable waters are great highways, and no individual, by use, can acquire a private right therein, any more than a continuous use of a street by a man, from his home to his place of business, for any term of years, gives him a private right of way over the soil of the street. In *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91, 106, Chief Justice Shaw uses this language: "The public have a right to regulate the use of public navigable waters for purposes of passage; and the erection of a bridge, with or without a draw, by the authority of the Legislature, is the regulation of a public right, and not the deprivation of any private right, which can be a ground for damages. So far, therefore, as the railroad erected by authority of the Legislature affected the right of the petitioners to pass or repass to and from their lands and wharves with vessels, it was a mere regulation of a public right, and not a taking of private property for a public use, and gave the petitioners no claim for damages." *Verdict set aside.*

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JOSEPH W. ROPES *vs.* FRANKLIN UPTON.

Essex. Nov. 10, 1877. — Aug. 30, 1878. MORTON & SOULE, JJ., absent.

A. and B., partners in business in D., dissolved their partnership by consent. A. agreed to assume the debts of the firm, and B. agreed in writing to sell to A. all his interest in the assets and good-will of the firm for a certain sum, and "not to manufacture or sell or become engaged in said business, either for myself or others, hereafter in the town of D., under the forfeiture of $1000 to be paid to said A. in case of breach of these conditions." *Held*, that A. was entitled to an injunction to restrain B. from violating his agreement.

BILL IN EQUITY, filed October 1, 1877, to restrain the defendant from violating the following agreement, dated August 3, 1876, and signed and sealed by him: "This may certify that I, Franklin Upton, of the town of Danvers, in consideration of the sum of $500 to me paid by Joseph W. Ropes, hereby agree to sell and relinquish all my interest and good-will in the business now conducted by Ropes & Upton, together with all debts now due them; and I hereby agree not to manufacture or sell or become engaged in said business, either for myself or others, hereafter in the town of Danvers, under the forfeiture of $1000 to be paid to said Ropes in case of breach of these conditions."

The bill alleged that Ropes, on or about August 1, 1861, entered into partnership with Upton, for the purpose of carrying on the business of manufacturing and selling stoves and tin ware in Danvers, under the firm name of Ropes & Upton, and so continued until August 1, 1876, at which time the partnership was dissolved by mutual consent; that they then agreed that Ropes should assume the payment of all debts of the firm, and Upton should sell to Ropes for $500 all his interest in the firm assets, including the good-will of the business, and agree not to engage in the business of manufacturing or selling stoves or tin ware, either for himself or others, thereafter, in Danvers, under a forfeiture of $1000 in case of breach of such agreement; that Ropes accordingly paid to Upton $500, and took from him the above agreement; and that Ropes then continued to carry on such business in Danvers in connection with his son, but that Upton, in violation of his agreement, had also become engaged in such business in Danvers, and still continued to carry on the

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same, to the great and manifest injury of Ropes. The prayer of the bill was for an injunction, and for general relief.

The defendant demurred for want of equity, and because the plaintiff had a plain, adequate and complete remedy at law.

The case was heard on bill and demurrer, before *Endicott*, J., who reserved the case for the consideration of the full court.

W. H. Gove, for the defendant.

J. A. Gillis, for the plaintiff.

ENDICOTT, J. When a party has sold to another all his interest and good-will in a particular business, and has agreed not to carry on the same business in the same place, a court of equity will prevent him by injunction from violating the express agreement he has made. *Angier* v. *Webber*, 14 Allen, 211. *Dwight* v. *Hamilton*, 113 Mass. 175. *Boutelle* v. *Smith*, 116 Mass. 111. Whether this case falls within the general rule is the question to be decided.

The parties were partners, engaged in the manufacture and sale of stoves and tin ware in Danvers. They dissolved their partnership by mutual consent. The plaintiff agreed to assume all the debts owed by the firm, and the defendant agreed to sell all his interest in the assets and good-will to the plaintiff for the sum of $500; and the defendant further agreed that he would not enter into the same business in Danvers, under a forfeiture of $1000 in case of breach of the agreement. In pursuance of this agreement, the defendant gave to the plaintiff the writing made a part of the bill.

The case turns upon the construction to be given to this agreement. If the defendant has agreed not to do the act under a penalty of $1000 for a breach, equity will restrain him; for a penalty is merely security for the performance of the contract, and is not the price for doing what a man has expressly agreed not to do. *Dooley* v. *Watson*, 1 Gray, 414. In *Hardy* v. *Martin*, 1 Cox Ch. 26, Lord Loughborough said, the court would restrain a person from setting up a trade in opposition to his agreement, although he had paid the penalty. If, on the other hand, the true interpretation of the agreement is that the $1000 was intended to be liquidated damages, then it is contended by the defendant that the court will not interfere by injunction, because the plaintiff has his complete remedy at law; and this mainly

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on the ground of the nature of this contract. In determining the question whether the sum named is a penalty or liquidated damages, courts give but little weight to the mere form of words, but gather the intent from the general scope and purport of the contract; and as it is difficult to estimate damages arising from the breach of an agreement, the subject matter of which is the good-will of a particular business, the current of authorities is to treat the sum named as liquidated damages rather than a penalty.

It is often stated that a court of equity will not interfere to prevent a party from doing an act which he has agreed not to do, when liquidated damages are provided in case he does the act. But this must be taken with some qualifications; for it must appear, from the whole contract, that the stipulated sum was to be paid in lieu of the strict performance of the agreement, and was an alternative which the party making the covenant had the right or option to adopt; as in the cases often cited in support of the general proposition; *Woodward* v. *Gyles*, 2 Vern. 119; *Rolfe* v. *Peterson*, 2 Bro. P. C. (2d ed.) 436; *Ponsonby* v. *Adams*, 2 Bro. P. C. 431. In *Woodward* v. *Gyles*, the defendant agreed not to plough any part of the land demised, and, if he did, to pay twenty shillings per acre; and it was held that he had the privilege to plough on paying the additional rent, and the court did not restrain him from doing that which the contract provided he might do. So in *Rolfe* v. *Peterson* and *Ponsonby* v. *Adams*, the substance of the contracts was held to be, that in one contingency the defendant was to pay a certain rent, and in another that he should pay a larger rent, and the court would not interfere. It is said, in all the cases on this subject, that the question in every case is, What is the real meaning of the contract? And if the substance of the agreement is, that the party shall not do a particular act, and that is the evident object and purpose of the agreement, and it is provided that, if there is a breach of this agreement, the party shall pay a stated sum, which does not clearly appear to be an alternative which he has the right to adopt instead of performing his contract, there would seem to be no reason why a court of equity should not restrain him from doing the act, and thus carry out the intention of the parties. If such appears to be the pur-

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pose of the agreement, the fact that the sum to be paid is a stated or stipulated amount, in the nature of liquidated damages, should not oust a court of equity of its jurisdiction to compel the party to carry out his agreement. In other words, naming a sum to be paid as liquidated damages does not in itself conclusively establish that the parties contemplated the right to do the act upon payment of the compensation, and make an alternative agreement for the benefit of the party who has done what he had agreed not to do.

A court of equity fastens on the real contract, and compels the execution of the very thing covenanted to be done. *French* v. *Macale*, 2 Dr. & War. 269, 276. It was said in that case by Sir Edward Sugden, afterwards Lord St. Leonards, "A man cannot protect himself against discovery, if he has done the act which he has covenanted not to do, because a penalty is annexed; if he engages not to do the act, he cannot be heard to say, this is a penalty; and whether the whole is or is not recoverable, he must in this court make discovery whether he has done the act." It is obvious that the word "penalty" is not here used in its technical sense. See also *Jones* v. *Green*, 3 Yo. & Jerv. 298.

It is clear, upon examining the language of this agreement as applied to the subject matter of the sale, that its object is to secure absolutely to the plaintiff the exclusive right, as against the defendant, to pursue the business of manufacturing stoves and tin ware in Danvers. The defendant, having sold his interest and good-will, expressly stipulates not to engage in the business. The language is, "I hereby agree not to manufacture or sell or become engaged in said business, either for myself or others, hereafter in the town of Danvers, under forfeiture of $1000 to be paid to said Ropes in case of a breach of these conditions." There is nothing here to show a right or option in the defendant to manufacture upon payment of the money, or that the agreement would be satisfied by the payment of the sum stated; it is an absolute engagement not to do certain acts, and thereby interfere with the plaintiff's business. This is a distinct agreement, independent of the stipulation as to the money to be paid, if he violates his agreement, or, to use the precise language, "in case of a breach of these conditions." These words show that the defendant could not engage in the business without break-

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ing the agreement not to do so. The substance of the whole paper is, that the defendant covenants that he will not do a particular thing, and then says, "If I do, I will pay you $1000 as satisfaction;" but this does not prevent a court of equity from enjoining him from doing that which he has agreed not to do. The language might well be treated as creating a penalty, except for the tendency of the courts in this class of cases, as before stated, to hold that liquidated damages were intended. But assuming this to be a case of liquidated damages, there is abundant authority to show that the distinction contended for is not regarded by courts of equity.

In *Sainter* v. *Ferguson*, 1 Macn. & Gord. 286, the defendant agreed not to practise within seven miles of Macclesfield under a penalty of £500. Upon application for an injunction to restrain a breach of the agreement, the court ordered the motion to stand over with liberty to the plaintiff to take proceedings at law. The plaintiff brought his action and recovered £500 by way of liquidated damages. *Sainter* v. *Ferguson*, 7 C. B. 716. He then renewed his application for an injunction, but the court refused to interfere. Lord Cottenham, in delivering judgment, said: "It is true that, if the plaintiff had seen the difficulty which has since arisen, he might have put the matter so as to have had the option left to him either of exercising his legal right or his equitable remedy, and not to have been precluded from the alternative which, before the action, he had, either to ask for an injunction, or to obtain compensation at law. The order, however, does not provide for this; it places the plaintiff under no restriction; it only refuses to interfere until the legal right has been tried. It was then the plaintiff's own choice to go on; and the matter now stands just as if the plaintiff had brought the action first, and then come to this court for an injunction." 1 Macn. & Gord. 290. And in *Fox* v. *Scard*, 33 Beav. 327, it was held, on the authority of *Sainter* v. *Ferguson*, that where a person enters into an agreement not to do an act and gives his bond to another to secure it in a penal sum, the latter has a right in law and equity, and can obtain relief in either, but not in both courts.

Two cases decided by Lord Hatherley, when Vice Chancellor, are in point. In *Bird* v. *Lake*, 1 Hem. & Mil. 111, two persons

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Hill and Lake, having been engaged in business as eating-house keepers, at two different houses, one 49 Cheapside, which had originally been Lake's, and the other 13 Gracechurch-street, which had from the first belonged to Hill, dissolved partnership and made an indenture by which it appeared that Lake had entered into a covenant that he would not use any means to obtain the custom or business of Hill, nor carry on the trade or business of an eating-house keeper, within one mile of Gracechurch-street, without paying Hill £1500, as or by way of stated or liquidated damages. It was held that this was an absolute covenant not to do an act, and that such covenant would not (in the absence of a bill to rectify the deed) be controlled by the recital in the deed in regard to the stated or liquidated damages. In *Howard* v. *Woodward*, 34 L. J. (N. S.) Ch. 47; *S. C.* 10 Jur. (N. S.) 1123, the condition of a bond contained the recital that the defendant had agreed to become the managing clerk of a solicitor, and that he would not practise at or within fifty miles of Weymouth, and if he did so, then, if he should pay to the solicitor £1000 as liquidated damages, the bond should be void. On breach by the defendant, it was held that the agreement was not intended to be satisfied by the payment of the sum named, and that the court would interfere by injunction. See also *Coles* v. *Sims*, 5 De G., M. & G. 1. The entry must therefore be *Demurrer overruled.*

WILLIAM SPARHAWK, administrator, *vs.* WILLIAM F. CLOON & another.

Essex. November 10, 1876; February 2. — August 31, 1878.

A testatrix devised all her property to a trustee to hold in trust for the sole use and support of her husband; to sell or exchange the property and reinvest the proceeds with his consent; to obtain his written receipt or assent for every payment of money or exchange and sale and reinvestment of property; to convey any part or all of the estate to such persons or associations and at such times as he might in writing designate and propose; and empowering the trustee "to relieve himself from trouble and care" by appointing her husband his agent or attorney. *Held*, that the husband took an equitable fee, which he might alienate, and which equity would apply to the payment of his debts.

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BILL IN EQUITY against William F. Cloon and Francis Parton, to reach and apply a trust fund in the hands of Cloon in payment of a debt due from Parton to the plaintiff.

The bill alleged that the will of Mary R. Parton, dated February 5, 1863, contained the following provisions:

"Item 1. I give, bequeath and devise all the property I may own at the time of my death, whether real, personal or mixed, and all contingent right vested in me to any property, or easement or interest, to and unto William F. Cloon, of Marblehead, Massachusetts, to be held by him in trust for the sole use and support of Francis Parton, my husband, of Lynn aforesaid, the said Francis hereunto giving his assent to this bequest. And I hereby require said Cloon, as trustee, to advise with my said husband, and to appoint, according with his advice, one or more, to succeed him as my and his trustee, successors to hold my said property, in trust as aforesaid, should he desire to decline said trust, or be in apprehension of his own death. And said trustee is further empowered to sell or exchange any of my aforesaid estate, and reinvest the proceeds thereof whenever he and my husband may deem profitable. And said trustee is empowered to relieve himself from trouble and care by appointing my husband his agent or attorney. A receipt or a written assent, signed by my husband, shall free said trustee from legal liability for any money paid by him or for any act he may perform as my trustee. And such a receipt or written assent, signed by my husband, must be obtained in every such instance of payment, or exchange and sale, and reinvestment of property.

"Item 2. I hereby make it the duty of said trustee, and all he may appoint to succeed him, to convey by deed any part or all of my said estate to such associations, person or persons as my husband may designate and propose hereafter by certified written authority, leaving with my husband to fix the time of any such conveyance.

"Item 3. I hereby nominate and appoint Francis Parton, my husband, to be sole executor of this my last will and testament. And it is my desire and will, that he be not required to give a bond for the faithful performance of his duties as my executor."

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The bill further alleged that the will was duly admitted to probate; that Cloon accepted the trust, and held under it certain land and personal property, from which he received the rents, profits and income; that on June 20, 1876, Francis Parton executed an assignment under seal, which, after reciting the provisions of the will in his favor, and that he had been arrested on an execution issued on a judgment obtained by the plaintiff for debt, and that the magistrate, to whom he applied to take the oath for the relief of poor debtors, was in doubt whether he could properly administer the oath without such an assignment, proceeded as follows: "I, the said Francis Parton, do hereby assign, set over and convey to the said William Sparhawk all the assignable powers, privileges and interests which I may or can assign, or which I am under obligation to assign, in order to enable me to take the oath for the relief of poor debtors, it being understood that if the said Sparhawk is entitled to recover any part of the principal or income of said trust property he shall not be entitled to recover under this assignment a sum beyond the principal, interest and costs of said judgment. The said Parton not hereby intending to waive any rights by making this assignment, but intending to simply empower the said Sparhawk to reach and obtain any rights as a creditor he may have against the interest of said Parton as the *cestui que trust* under said will."

The bill further alleged that the plaintiff subsequently demanded of Cloon payment and transfer of Parton's interest in the trust fund, but that Cloon refused to pay to him any part of the income or principal of such fund.

The prayer of the bill was that Cloon might be ordered to pay the debt due to the plaintiff, either out of the principal or out of the income of the trust fund.

The defendants demurred, on the grounds that by the will Parton had no interest in the trust property, which the plaintiff, as his creditor or under the assignment, could reach and have applied to his benefit; that under the assignment the plaintiff acquired no rights in the trust property greater than he would have had without it; and for want of equity.

The case was heard on bill and demurrer, before *Endicott*, J., who reserved it for the consideration of the full court.

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The case was argued in November 1876, by *J. W. Perry & L. S. Tuckerman*, for the defendants, and *R. E. Harmon*, (*J. A. Gillis* with him,) for the plaintiff; and additional briefs were submitted in February 1878, by *Tuckerman*, for the defendants, and by *Gillis & Harmon*, for the plaintiff.

GRAY, C. J. At law, any property, real or personal, that a man owns, may be alienated by him, or may, unless specially exempted by statute, be taken for the payment of his debts; and no form of grant or devise can enable the grantee or devisee to hold the estate without its being subject to alienation, attachment and execution. Co. Lit. 223 *a*. *Blackstone Bank* v. *Davis*, 21 Pick. 42.

From the time of Lord Eldon, the same rule has prevailed in the English Court of Chancery to the extent of holding that where the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate, that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. *Brandon* v. *Robinson*, 18 Ves. 429; *S. C.* 1 Rose, 197. *Rochford* v. *Hackman*, 9 Hare, 475. 2 Spence Eq. Jur. 89, and cases cited.

The English doctrine has been approved in many decisions and *dicta* in this country. *Tillinghast* v. *Bradford*, 5 R. I. 205. *Mebane* v. *Mebane*, 4 Ired. Eq. 131. *Heath* v. *Bishop*, 4 Rich. Eq. 46. *Smith* v. *Moore*, 37 Ala. 327. *McIlvaine* v. *Smith*, 42 Misso. 45. *Sanford* v. *Lackland*, 2 Dillon, 6. Walworth, C., in *Hallett* v. *Thompson*, 5 Paige, 583, 585. Comstock, J., in *Bramhall* v. *Ferris*, 14 N. Y. 41, 44. Swayne, J., in *Nichols* v. *Levy*, 5 Wall. 433, 441.

On the other hand, it has been maintained by judges whose opinions are entitled to the highest respect, that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors; and that his intentions in this regard, when clearly expressed by him, must be carried out by the court. *Braman* v. *Stiles*, 2 Pick. 460, 464. *White* v. *White*, 30 Vt. 338, 344. *Arnwine* v. *Carroll*, 4 Halst. Ch. 620, 625. *Holdship* v. *Patterson*, 7 Watts, 547

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Brown v. *Williamson*, 36 Penn. St. 338. *Rife* v. *Geyer*, 59 Penn. St. 393. *Nichols* v. *Eaton*, 91 U. S. 716, 727–729, and other cases there cited. *Hyde* v. *Woods*, 94 U. S. 523, 526.

Much of the argument in this case has been addressed to the question upon which the authorities are in conflict. But we are not required now to determine that question, because we find in this will no expression of intention that the trust estate shall not be alienated by the *cestui que trust* or not be liable to his debts.

The duties imposed on the trustee are to hold the estate in trust for the sole use and support of the husband of the testatrix, to sell or exchange the property and reinvest the proceeds with his consent, to obtain his written receipt or assent for every payment of money or exchange and sale and reinvestment of property, and to convey any part or all of the estate to such persons or associations and at such times as he may in writing designate and propose; and the trustee is empowered "to relieve himself from trouble and care" by appointing the husband his agent or attorney.

No other person is named in the will as *cestui que trust*, either during the life of the husband or after his death; no accumulation of income is provided for or contemplated; nor is any disposition made of the remainder after his death in case of his not exercising the power conferred upon him; and no restrictions whatever are imposed by the will, or committed to the discretion of the trustee, as to the amount of principal or income that the husband may receive, or the uses to which he may apply them.

The whole effect of the will is to vest the legal title and a simple trust in the trustee, and the right to receive the whole income, as well as the absolute *jus disponendi* of the principal, in the *cestui que trust*. The husband therefore took an equitable fee, which he might alienate, and which equity would apply to the payment of his debts. Lewin on Trusts, (3d ed.) 21, 585, 595. *Barford* v. *Street*, 16 Ves. 135. *Moore* v. *Cleghorn*, 10 Beav. 423, and 17 L. J. (N. S.) Ch. 400. *Earl* v. *Grim*, 1 Johns. Ch. 494. *Palmer* v. *Stevens*, 15 Gray, 343.

The decisions of this court, cited by the learned counsel for the defendants, are in no wise inconsistent with this conclusion.

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In *Perkins* v. *Hays*, 3 Gray, 405, the question was whether the terms of the will by which the annuity was given allowed it to be alienated by anticipation. In *Hall* v. *Williams*, 120 Mass. 344, and in *Russell* v. *Grinnell*, 105 Mass. 425, the will manifested the intention of the testator that his trustees should have discretionary power either to apply or to withhold and accumulate the income. See also *Chambers* v. *Smith*, 3 App. Cas. 795.

Demurrer overruled.

PHINEAS R. WESTON & another *vs.* NATHANIEL WESTON & others.

Essex. January 19. — August 31, 1878.

A testator, by his will, after giving certain real estate to his widow in fee, with all his furniture, and a certain sum in trust for the support of a deceased son's wife and children, devised the residue of his estate in trust to support his widow out of the income during her life, to pay a certain annuity to his son and daughter "during the continuance of this trust," to add the surplus income to the residue, to permit his deceased son's widow to occupy a certain dwelling-house free of rent during her widowhood, and, "as soon as may be after the decease of my said wife, my said trustees or their successors shall convey, transfer or pay to my son and daughter, in equal shares, all the estate here given in trust, if they both survive my said wife, subject to the right of the widow of my said son, deceased, to occupy as aforesaid said tenement in my said house during her widowhood. In case either of them should die in the lifetime of my said wife, leaving no issue, the said estate given in trust shall be transferred or conveyed to the survivor, subject to the same right of my said son's widow." The son survived the widow, and the daughter, who was married after the death of the testator, died before her, leaving a son and a husband, who was appointed her administrator. *Held*, that the testator's son and daughter each took a vested equitable remainder in the residue, expectant on the termination of the widow's life estate, and liable to be divested only by the death of either of them in the widow's lifetime without leaving issue; that the son was entitled to one half of the residue, and the daughter's administrator to the other half; and that the daughter's annuity ceased with her death, her administrator being entitled to the proportional part thereof for the time between the last payment to her and her death.

BILL IN EQUITY by the trustees under the will of Nathaniel Weston, against Nathaniel Weston, a son of the testator, Charles T. Jenkins, the administrator of the testator's daughter, Lawrence W. Jenkins, the daughter's only child, and the children of Edward Weston, a deceased son of the testator, to obtain the

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instructions of the court. Hearing on bill and answers, before *Lord*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

J. A. Gillis & J. H. Fiske, for Nathaniel Weston.

S. Lincoln, Jr., for Charles T. Jenkins.

S. B. Ives, Jr., for Lawrence W. Jenkins.

J. B. F. Osgood, for the children of Edward Weston.

SOULE, J. The testator, by his will, gave certain real estate to his widow in fee, with all his furniture. He then gave to trustees the sum of forty thousand dollars for the benefit of the children of his deceased son Edward. The residue of his estate he gave to trustees, on the trusts, first, to support his widow out of the income during her life; second, to pay an annuity of one thousand dollars to each of his surviving children, Nathaniel and Lucy, "during the continuance of this trust;" third, to add any surplus income to the "residue;" fourth, to permit the widow of his son Edward to occupy a certain dwelling-house free of rent during her widowhood; and fifth, as follows: "As soon as may be after the decease of my said wife, my said trustees or their successors shall convey, transfer or pay to my son and daughter, in equal shares, all the estate here given in trust, if they both survive my said wife, subject to the right of the widow of my said son, deceased, to occupy as aforesaid said tenement in my said house during her widowhood. In case either of them should die in the lifetime of my said wife, leaving no issue, the said estate given in trust shall be transferred or conveyed to the survivor, subject to the same right of my said son's widow." The testator died on November 6, 1868. His widow died on April 25, 1877. His son Nathaniel is living. His daughter Lucy, who was married after her father's death, died on March 22, 1874, her husband, Charles T. Jenkins, and her son, Lawrence W. Jenkins, surviving her. They are still living, and Charles T. has been appointed administrator of her estate. The trustees under the will ask the instructions of this court as to the construction of the clause of the will, above quoted; and as to the question whether the annuity to Lucy terminated with her life, or was payable after her death to her son or administrator.

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As to the last named question, it is clear that the annuity terminated with the life of Lucy. The clause creating it, being without words of inheritance or succession, must be construed as giving an annuity during the life of the widow of the testator, that being the term of the trust, if Lucy should live so long, and if she should not, for her own life only. But the annuity is within the provisions of the Gen. Sts. *c.* 97, § 24, and the administrator of Lucy's estate is entitled to a proportional part for the time between the last payment to her and the date of her death. *Bates* v. *Barry*, *ante*, 83.

The other question is of much greater importance. It is contended by the children of Edward Weston that the whole residue should be distributed as intestate estate; by Nathaniel, that one half of said residue is his, and that the other half should be distributed as intestate estate; by Lawrence W. Jenkins, that he is entitled to one half the residue, as a remainder by implication; and by Charles T. Jenkins, that he is entitled, as administrator of the estate of Lucy, his wife, to the half of the residue which she would have taken if she had survived her mother, the widow of the testator.

The intention of the testator is to determine the construction of the clause under consideration, and is to be ascertained from the will as a whole. And it is evident from the whole instrument that, after setting apart the sum of forty thousand dollars for the children of his son Edward, providing for Edward's widow and for his own wife, the testator had in mind as beneficiaries, in disposing of the residue of his estate, only his son Nathaniel and his daughter Lucy. It is presumed, also, that he did not intend to leave any part of his estate intestate. It was argued that the language employed, requiring the trustees to convey to the son and daughter in equal shares if they should both survive the testator's wife, gave to them a contingent estate only, which failed to vest by reason of the death of Lucy during the life of the testator's wife, and that the gift of the whole residue to the survivor, if either died during the lifetime of the testator's wife, leaving no issue, failed to vest, because Lucy left issue, and the contingency contemplated did not occur. This is a forced and unnatural construction. The two parts of the provision disposing of the residue are not to be regarded as separate

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and independent matters, but are to be taken together, the one as qualifying the other. Thus taken, they show clearly that it was not intended that the interest of either the son or daughter should depend on both surviving the testator's widow, but rather that the residue should go to the son and daughter; and, in order that no part of it should in any event go to any one else than them or their children, it was added that if either should die before the testator's widow, without leaving issue, the other should take the whole. The words, "if both survive my said wife," are to be regarded as qualifying the previous words, "in equal shares," and not as affecting the vesting of the gift. It is impossible to suppose that the testator intended that, if one died without issue, the other should take the whole, but that, if one died leaving issue, the other should be left to take a distributive share equally with all the next of kin, while, if both survived, the two were to take the whole.

We are of opinion that the will gave to Nathaniel and Lucy each a vested equitable estate, expectant on the termination of the life estate of the testator's wife, and liable to be divested only on his or her death during the life of the testator's wife, without issue. The interest in the residue was given by the will, not by the conveyance from the trustees. Such conveyance is necessary only to make that a legal estate or interest which, under the will, and prior to the conveyance, was an equitable interest. It was an equitable remainder after the equitable life interest of the testator's wife, and vesting immediately on the death of the testator. *Phipps* v. *Ackers*, 9 Cl. & Fin. 583. *Ackers* v. *Phipps*, 3 Cl. & Fin. 665. *Phipps* v. *Williams*, 5 Sim. 44.

As the event by which alone the estates of Nathaniel and Lucy could be divested never occurred, it follows that Nathaniel is entitled to one half the residue, and that the administrator of Lucy is entitled to the other half. *Decree accordingly.*

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FREDERICK W. RIPLEY *vs.* JOHN MCBARRON.

Suffolk. March 6. — Aug. 7, 1878. COLT & SOULE, JJ., absent.

In an action by A. against B. for malicious prosecution, it appeared that A. was arrested on a warrant issued on a complaint made by B., in which the latter charged A. with an assault upon him; and that, on the trial of the complaint, B. stated to the court that a mistake had been made by the officer of the court, to whom the complaint was made; and, at the request of B., A. was discharged. B. introduced evidence that, when he made the complaint, he stated, to the officer who issued it, that an assault had been committed by A. upon C., a servant of B.; that he did not read the complaint when he signed it, and did not know that it charged an assault upon himself; and that he had no probable cause of complaint against A., but made the complaint in behalf of C. He then offered to show that an assault had been committed by A. upon C. before he made the complaint; but the judge excluded it. *Held*, that the evidence excluded was competent on the issue of malice.

TORT for malicious prosecution. Writ dated October 11, 1876. At the trial in the Superior Court, before *Allen*, J., without a jury, the plaintiff introduced evidence tending to show that the defendant made a complaint against him to the Municipal Court of Boston, in which he charged the plaintiff with an assault and battery upon him; and that he was arrested on a warrant issued on said complaint, and was discharged on September 26, 1876. On cross-examination, he testified that, when the case came on to be heard, the defendant stated to the court that a mistake had been made; and that he was then discharged without an examination, at the request of the defendant.

The defendant introduced evidence tending to show that, when he made the complaint, he stated to the officer of the court that an assault had been made by the plaintiff upon James Bogue, a servant of the defendant; that he did not read the complaint when he signed it, and did not know that it charged an assault upon himself; that he did not at the time of the complaint, nor at any time, allege that the plaintiff had committed an assault upon him; that he had no cause of complaint against the plaintiff, and that the complaint was made in behalf of Bogue; that he stated to the court, when the case came on to be heard, that a mistake had been made by the officer of the court, and requested the court to discharge the plaintiff on that account.

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The defendant then offered evidence to show that an assault had been made upon Bogue by the plaintiff, immediately before the complaint was made by the defendant. But the judge excluded the evidence; and found for the plaintiff in the sum of $50. The defendant alleged exceptions.

C. B. Southard, for the defendant.

J. B. Richardson & E. B. Hale, for the plaintiff.

MORTON, J. In an action for malicious prosecution, the burden is upon the plaintiff to prove that the defendant has instituted against him a prosecution, civil or criminal, which has been terminated in his favor, and that it was instituted maliciously and without probable cause. Malice may be inferred by the jury from want of probable cause, but it is not a necessary inference. In ordinary cases, proof that the defendant knowingly and designedly commenced a prosecution without reasonable or probable cause would be sufficient proof of malice; but the question of the existence of malice is a distinct issue, and even if it be shown that the prosecution was without probable cause, it is competent for the defendant to introduce evidence to show that it was instituted in good faith and without malice. *Savage* v. *Brewer*, 16 Pick. 453. *Cloon* v. *Gerry*, 13 Gray, 201. *Barron* v. *Mason*, 31 Vt. 189.

In the case at bar, the prosecution, alleged to be malicious, was a complaint made by the defendant to the Municipal Court of the city of Boston, in which he charged the plaintiff with an assault and battery upon him, the defendant. At the trial, the defendant admitted that the plaintiff had never assaulted him, and that there was no probable cause for such complaint. But he introduced evidence tending to show that, when he made the complaint, he stated to the officer of the court that an assault had been committed upon one Bogue, a servant of the defendant; that he intended to complain of an assault on Bogue, but, by a mistake, the complaint was written so as to charge an assault upon himself; that he did not read the complaint when he signed it, but supposed it to be a charge of an assault upon Bogue, and that, when he discovered the mistake, he notified the court of it, and thereupon the plaintiff was discharged. He then offered evidence to show that an assault had been made

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upon said Bogue by the plaintiff immediately before said complaint was made, which evidence the court excluded.

We are of opinion that this evidence was competent and should have been admitted. Proof that the plaintiff committed an assault upon Bogue would corroborate the evidence of the defendant, and would tend to show that he had just ground for making a complaint, and that the complaint, as made, was the result of an innocent mistake. If the defendant, in making the complaint, acted in good faith and with the honest purpose of bringing an offender to justice, the prosecution, even if it can be held to be without probable cause, was not malicious. It is not necessary to decide whether an innocent misdescription of an offence, like that in the case at bar, shows a want of probable cause for the prosecution, because, if the prosecution instituted by the defendant is held to be, as admitted by him, without probable cause, yet the evidence rejected was competent upon the issue of malice. It would tend to rebut the inference of malice arising out of the fact that he had instituted a groundless complaint.

Although this case was tried by the court, the defendant has the same right of exception as if the evidence had been excluded in a trial by a jury. *Exceptions sustained.*

JOHN R. POOR *vs.* HUMBOLDT INSURANCE COMPANY.

Suffolk. March 5. — Aug. 27, 1878. COLT & SOULE, JJ., absent.

In an action on a policy of insurance, by which there is "warranted a family to live in said house throughout the year," evidence that, at the time of the fire and for some time previously thereto, the only occupancy of the insured premises was by two workmen, who took their meals and were employed elsewhere during the day, but kept their trunks and clothing and slept at night in one of the rooms on the insured premises, will not justify the jury in finding that the warranty has been complied with.

CONTRACT on a policy of insurance, dated July 12, 1875, by which the plaintiff was insured in the sum of $2500 "on his frame building and fixtures known as the Oceanic House, situate in the town of Gosport, Star Island, Isles of Shoals, N. H."

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The policy also contained the following clause: "Warranted a family to live in said house throughout the year."

At the trial in the Superior Court, before *Putnam*, J., the execution of the policy, and the loss of the insured premises by fire on the night of November 11, 1875, during the term of the policy, were admitted; and the only question was whether there had been a compliance with the warranty.

Benjamin F. Timmins, called by the plaintiff, testified that he was employed by the plaintiff as porter in the hotel at Star Island in the summer of 1875; that the hotel closed for the season about September 15; that he and Daniel Murray, after the house was closed, slept for about two weeks in a room two stories over the office of the hotel in the main house; that they both spent every night together at the hotel; that Murray then left and Patrick Philben took his place; that after a time their room was changed to a room over the kitchen, so that they might be able to have a stove when the weather should become cold; that no stove was ever set up; that the witness and Philben slept in the room every night until the fire, and were sleeping there that night; that neither of them was off the island, from the time the house closed until after the fire; that they hauled stone and lumber from the back part of the island; that they kept their clothes and trunks in the room they slept in; that they went through the house every evening with a dark lantern to see that the windows were locked; that the plaintiff had twelve or fourteen men on the island who lived at the Atlantic House where the witness and Philben took their meals; that they used to go out in the morning to their breakfast, and went back at night to sleep, and that sometimes they went in in the daytime to change their clothes.

Patrick Philben testified that he was hired by the plaintiff in June, 1875, to go to Star Island; that during the summer he lived at a house on the island; that, after the hotel closed and Murray went away, he went to the Oceanic House and roomed with Timmins; that he slept there every night until after the fire; that they roomed there every night and occasionally came in at noon times, and, when business called them, several times through the day; that he often went in to change his boots; that about all the time he was around the house; that they kept their trunks

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and all their clothes there, and went to the Atlantic House to get their meals; that they generally had supper about six o'clock, and stood round afterwards at the Atlantic House with twelve or fourteen men talking till bedtime; that they went through the lower part of the Oceanic House with a dark lantern nearly every night, and sometimes went up stairs; that they had no light except a dark lantern and a candle in their room; and that they moved from the room over the office to a room over the kitchen, because there was no chimney near the first room.

After the house closed in September, there was no other occupancy than such as appears from the above evidence, and this was all the evidence bearing on the point in issue.

The defendant put in no evidence; but, upon the close of the plaintiff's case, moved for a nonsuit, on the ground that the evidence offered by the plaintiff would not warrant the jury in finding that there was a family living in the house at the time of the fire. The judge overruled the motion, and the case was submitted to the jury upon the question whether the warranty had been complied with.

The defendant asked the judge to give the following rulings: "1. The occupation of the premises by two hired men in the plaintiff's employ, who took their meals and were employed during the day on other premises, but slept in the insured premises by night, was not such an occupation of the premises as complied with the warranty that a family should live in said house. 2. If the jury find that the plaintiff and his wife and children were not living at the Oceanic House at the time of the fire, and that the only occupation of said house was by two laborers sleeping in it and spending their days and taking their meals elsewhere, such occupation would not be a compliance with the warranty that a family should live in the house throughout the year. 3. Upon all the evidence in the case, the jury would not be warranted in finding a compliance with the warranty that a family should live in the house throughout the year."

The judge refused to rule as requested, and instructed the jury as follows: "There is no evidence from which the jury can find an occupation by the plaintiff and his family; but the warranty does not speak of any particular family, but 'a family,' and if

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any family lived there throughout the year, it would be a compliance with the warranty. While the common meaning of the term 'family,' as ordinarily understood, is the dwelling together of those of the same lineage, bound together by ties of blood or marriage, yet another definition of the term 'family' is 'the dwelling together of two or more persons collectively in a house,' and if those two persons dwelt, resided and abode together, in this house, as their home, they constituted a family residing there, though they were not in the house all of the time and did not take their meals in the house; and the jury are to say, upon the definition of the word 'family,' having regard to the purposes and objects of the stipulation, whether there was or not a reasonably substantial compliance with the warranty."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal to rule as requested.

G. Putnam, Jr., (*W. G. Russell* with him,) for the defendant.

E. S. Mansfield, (*G. A. Somerby* with him,) for the plaintiff.

AMES, J. The stipulation that a family should live in the house throughout the year was an express warranty, and without its literal and exact fulfilment the policy would cease to be binding upon the company. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416. *Sayles* v. *North-Western Ins. Co.* 2 Curtis, 610. Its natural interpretation would be that during the year the house was to be under that kind of care and supervision which would be furnished by its ordinary and continuous occupation by a family keeping house in it and making it their home. It is manifest that the security against fire, furnished by such a use of the house, would be more effectual than the occasional, even though frequent, visits of watchmen. If the insured desired nothing more than that two watchmen should sleep in the house, he could easily have had such a provision inserted in the policy. Taking the word "family" in its ordinary and popular sense, we see no ground for holding that the two workmen who slept in the building constituted a family within the meaning of the policy. They were two laborers, selected from twelve or fourteen, who were employed by the plaintiff in hauling stone and lumber at another part of the island. Their occupation of the house consisted in sleeping every night, and in keeping their trunks and clothing, in one of the rooms. They took their meals elsewhere, and went

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the rounds every night with a dark lantern, usually visiting the house at about bedtime, and leaving it before breakfast. That is to say, they were watchmen, not a family. We think therefore that the defendant was entitled to the rulings which it requested, and that the jury were not justified in finding that the plaintiff had complied with the warranty.

Exceptions sustained.

FIRST WARD NATIONAL BANK *vs.* JOHN W. THOMAS.

Suffolk. Nov. 14, 15, 1877. — Aug. 28, 1878. COLT & AMES, JJ., absent.

If the owner of personal property, which has been attached on a writ against him, and duly sold by a deputy sheriff, makes an assignment of the property "and the proceeds thereof," the title to such proceeds vests in the assignee, subject to the attachment; and if, after dissolution of the attachment, the officer, having been notified of the assignment, and demand having been made upon him by the assignee, fails to pay over such proceeds, it is a neglect of official duty on his part, for which the sheriff is liable in an action by the assignee.

CONTRACT, with a count in tort, against the sheriff of Norfolk, for the wrongful act of Henry A. Darling, his deputy. Trial in the Superior Court, before *Colburn*, J., who ruled that the plaintiff was entitled to recover; and the defendant alleged exceptions, the substance of which appear in the opinion.

F. D. Ely & W. H. H. Andrews, for the defendant.

M. F. Dickinson, Jr., for the plaintiff.

LORD, J. The defendant's deputy attached the property of one Roberts upon a writ sued out against him by the plaintiff. The property thus attached was sold by such deputy, and the proceeds thereof came into his hands. No objection is made that such sale was not in all respects legal. The deputy was bound to account for the proceeds according to law, and no claim is made that the defendant is not responsible to the proper party if his deputy fails to dispose of such proceeds according to his official duty. The suit in which the property was attached did not proceed to judgment; but the entry of "neither party" was made in it. In that state of things, *primâ facie*, the proceeds in the hands of the deputy are to be delivered to Roberts, the de-

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fendant in that suit, and that being the official duty of the deputy, the defendant, the sheriff, is liable for the deputy's failure to perform it. While the proceeds were thus in the hands of the deputy, and the action was still pending, the paper * recited in the bill of exceptions was executed between the parties to that suit; and the question presented for our consideration is, whether, by force of such agreement, it became the official duty of the deputy to deliver such proceeds to the plaintiff. If it was his official duty thus to deliver, the defendant is responsible for his refusal to perform it; if it was not his official duty though it might be his personal duty so to do, the defendant would not be answerable for his neglect to perform a merely personal duty.

If the goods had remained specifically in the hands of the deputy, and, while thus in his hands, they had been sold to a third party subject to the lien of the attachment, the property in the goods would have passed to the vendee; and, upon a dissolution of the attachment, it would have been the official duty of the deputy to deliver the goods to such vendee. *Tuxworth* v. *Moore*, 9 Pick. 347. *Fettyplace* v. *Dutch*, 13 Pick. 388. *Whitaker* v.

* "Whereas the First Ward National Bank of Boston, in the county of Suffolk and Commonwealth of Massachusetts, has brought a suit against Henry A. Roberts of said Boston, and has attached certain personal property belonging to said Roberts situated in Medway, in the county of Norfolk and Commonwealth aforesaid, said writ being returnable to the Superior Court, Suffolk County, on the first Tuesday of January, A. D. 1875. And whereas said bank has brought another suit against said Roberts, being a trustee process, returnable on the first Tuesday of April, A. D. 1875, and attached certain personal property and trusteed certain property in the hands of the trustees mentioned in said writ. And whereas certain of the personal property attached on said first named writ has been sold by the sheriff attaching the same at public auction. Now therefore be it known that I, Henry A. Roberts, aforesaid, acknowledge that I am indebted to said bank for a sum of money larger than the value of said property attached, and the amount trusteed under and by virtue of said writs, and hereby ratify and confirm said sale by the said sheriff, and consent that the remaining property may be sold by the sheriff, and hereby sell, assign and transfer to said bank all of said personal property attached and trusteed and the proceeds thereof, the same to be credited by said bank as part payment of any sum that I am owing it, and to be applied by said bank as part payment thereof.

"Witness my hand and seal this fourth day of January, A. D. 1875.

"Henry A. Roberts. [Seal.]"

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Sumner, 20 Pick. 399. *Appleton* v. *Bancroft*, 10 Met. 231. The property, however, having been reduced to money, the question presented is, whether the proceeds in money passed to the plaintiff, so that by the assignment such proceeds could be demanded by the plaintiff of the attaching officer; or whether it was merely the assignment of a chose in action against the officer, requiring the remedy to be sought in the name of the assignor, and giving no right of action in the name of the assignee. We are of opinion that it is not merely a chose in action which passes by the agreement, but that the plaintiff succeeds to the rights of the original owner of the goods, and upon the attaching officer devolves the duty of regarding the plaintiff as the absolute owner of the property upon the dissolution of the attachment.

In *Appleton* v. *Bancroft*, 10 Met. 231, the defendant had attached a horse, the property of one Beals, upon a writ against said Beals. On the day after the attachment, Beals mortgaged the horse to the plaintiff Appleton. The officer sold the horse, as he might under the law. The action was entered "neither party." In that case the action was for money had and received, but it was directly against the deputy, who had received the money, and not against the sheriff, who is responsible for the proper performance of official duty by his deputy. Chief Justice Shaw says: "But the horse could not be demanded, because in the mean time the officer had sold him, as by law he rightfully might. Rev. Sts. *c.* 90, § 57. What is the object of this statute? Not to alter the rights of parties, but to substitute, and place in the hands of the sheriff, imperishable money, requiring no expense to keep it, in place of perishable property, expensive to keep. Then the statute provides how the money shall be disposed of. 'And the proceeds of the sale, after deducting necessary charges, shall be held by the officer, subject to the attachment or attachments, and shall be disposed of in like manner as the same property would have been held and disposed of, if it had remained unsold.' This looks to the various contingencies, and directs the money to go as the property would have gone. If, as we suppose, on the dissolution of the attachment, the plaintiff would have been entitled to have the horse, he is entitled to have the money. The statute gives the

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right and creates the duty of the officer." It may be remarked that the language of the General Statutes upon this subject is the same as that of the Revised Statutes. Gen. Sts. *c.* 123, §§ 72, 77.

It seems therefore that it is the duty of the officer attaching property to hold the same during the continuance of his lien, either in specie or by converting it into money, according to the provisions of law; that during that time the *jus disponendi* remains in the general owner, subject to the officer's lien; that when the lien is dissolved, the law, which before has given him the right to hold the property, "creates the duty" of delivering the property or its proceeds to its rightful owner. The duty thus created is an official duty, for the performance of which by his deputy the sheriff is bound. The particular time at which the transfer of the right of property is made is immaterial, if made while the lien continues. The duty of the officer is the same in relation to the subject, whether the property remains specifically or he is holding the proceeds as he should hold the property. The transfer of the property was in these words, "hereby sell, assign and transfer all of said property attached and trusteed and the proceeds thereof." It is true that the instrument gives the power to the deputy to sell what property he then has in his possession under the attachment unsold; and, if he had subsequently sold such property and converted it into money, the question might arise whether the sale was an official act for which the sheriff would be responsible, or his personal act as agent of the parties. But it appears in this case that no sale was made under that authority or subsequently to it; but that the sale was in the due course of proceeding in his duty as an officer and before such power was given to him.

New Hampshire Savings Bank v. *Varnum*, 1 Met. 34, was a suit against the sheriff for the default of his deputy in not paying over money received for attached goods sold; and the defence was that the sale was made, by agreement of the parties to the suit, in a mode not authorized by law, and that therefore the deputy must be deemed to be the agent of the parties in the receipt of the proceeds, and not to have received them officially, and so the sheriff was not responsible. But the court make this distinction: If by reason of the mode of sale a loss happened, it

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would not be through the official misconduct of the deputy, and the sheriff would not be liable; but inasmuch as the proceeds came into the deputy's hands without loss, the subsequent keeping of the proceeds was an official duty, for which the sheriff was responsible. It is not, however, necessary to rely upon that decision, for, in the case at bar, no sale was made after nor by reason of such agreement.

Upon the whole case, we are of opinion that the power to dispose of the property subject to the lien remains while the lien exists; and, when the lien is dissolved, the property or its proceeds, as the case may be, pass to the vendee, and it is the duty of the officer to deliver the property attached, or its proceeds, to the party having the title thereto at the time of such dissolution; and for neglect of this official duty the sheriff is liable. It follows that the *Exceptions must be overruled.*

EMMA A. MORSE, administratrix, *vs.* GLENDON COMPANY.

Suffolk. March 29, 1877. — Aug. 29, 1878. AMES & LORD, JJ., absent.

In an action against a corporation for personal injuries occasioned to an employee, there was evidence that the defendant had a machine for drying lumber by steam pressure, consisting of a cylinder made of boiler iron, open at one end, to which was attached a rim and a door to be shut when in use; that the cylinder was made to order, but the rim and the door were purchased of a manufacturer; that the door when closed was held firmly in place by an arrangement of levers, screws, bolts and eye bolts; that on the outer edge of the rim, under the edge of the door when shut, was a groove to be filled by a gasket to make the door steam-tight; that the president of the corporation directed its engineer, who had charge of all the engines and machinery, to set up the machine and put it in working order; that the rim with the door attached was properly riveted to the open end of the cylinder, and a gasket was procured and placed in position; and the machine was then examined and tested by official inspectors of steam-boilers, and subjected to a pressure of one hundred pounds to the square inch, and certified to be sound and fit for use, and safe at a working pressure of sixty-six pounds to the square inch; that the engineer found that the gasket was too thin, and, under the test of the inspectors, the cylinder leaked; that he procured another gasket, and was engaged in fitting it in its place, when the employee joined him, and was told that he might take hold and help on the boiler, and he did so; that the second gasket was much thicker than the first, and there was difficulty in closing the door so that no steam would escape; that the door was shut twice as closely as possible, but each time, with a pressure of thirty-five pounds of steam, there was a leak; that the engineer then

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found that there was an unevenness where the ends of the rubber of the gasket lapped together, and made a new adjustment, closed the door, and let the steam on; that at a pressure of twenty pounds there was a slight leak; that the engineer started to let off the steam, when there was an explosion throwing open the door, and causing the injuries complained of. *Held*, that there was no evidence of negligence on the part of the defendant, either in the selection of the machine, or of the servant charged with the duty of putting it in order for use; and that the action could not be maintained.

TORT for personal injuries occasioned to the plaintiff's intestate, John H. Morse, while in the employ of the defendant corporation. Trial in this court, before *Lord*, J., who reported the case for the consideration of the full court. If, upon the evidence, it would be competent for the jury to find for the plaintiff, the case was to stand for trial; otherwise, the plaintiff was to become nonsuit. The nature of the evidence appears in the opinion.

E. O. Shepard, for the plaintiff.

E. M. Johnson, for the defendant.

ENDICOTT, J. In our view of this case the material questions are, whether there was any evidence offered by the plaintiff of negligence on the part of the defendant in the selection of the machine, or of the servant charged with the duty of putting it in order for use.

The machine was a boiler for drying lumber by steam pressure. It consisted of a cylinder made of boiler iron, twenty-four feet long and five feet in diameter, open at one end, to which was attached a rim and a door to be shut when in use. The cylinder was made in Boston; the rim and the door connected with it were purchased from a manufacturer in the West. The door when closed was held firmly in its place by an arrangement of levers, screws, bolts and eye bolts, a particular description of which and their operation is not important. On the outer edge of the rim, under the edge of the door when shut, was a groove an inch wide, and an eighth of an inch deep, to be filled by a gasket or other packing to make the door steam-tight. No gasket came from the West with the door.

The president of the defendant company directed the engineer, Odell, who had charge of all the engines and machinery in the yard, to set up the machine and put it in working order. The cylinder was placed upon a proper foundation, and the rim with

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the door attached was properly riveted to the open end. A gasket was procured by Odell and placed in position. The machine was then examined and tested by the United States inspectors of steam-boilers, and, with the doors closed, was subjected to a hydrostatic pressure of one hundred pounds to the square inch; and they gave a certificate that it was sound and fit for use, and would be safe with proper care for one year at a working pressure by steam of sixty-six pounds to the square inch. It was found by Odell that the gasket was too thin, that under the test of the inspectors it leaked, and there was some evidence that it was also tested by subjection to steam pressure, and leaked. He procured another gasket which was received the day before the accident. On the morning of the next day, he was engaged in fitting the new gasket in its place with a view of making the door tight, when the plaintiff's intestate, Morse, joined him. It does not appear by the report, in terms, in what capacity Morse was employed by the defendant; but it is clearly to be inferred that he was a machinist, accustomed to work upon and acquainted with machinery, though there was no evidence that he had any particular knowledge of the mechanism of this machine. Odell testified that while he was at work "Morse came along from the repair shop and said he was out of a job and asked me what he should do next. He was under my orders. I told him I was surprised that he had finished his job so soon; I expected it would take him all the forenoon. I told him he might take hold and help me on the boiler." He did so. This gasket was much thicker than the first, and the difficulty experienced was in closing the door, so that no steam would escape. The door was shut twice by means of the screws as closely as possible, but each time with a pressure of thirty-five pounds of steam there was a leak. It was then found by Odell that there was an unevenness where the ends of the rubber of the gasket lapped together; he then made a new adjustment, the door was again closed and the steam let on; at a pressure of twenty pounds there was a slight leak. Odell said to Morse, "It is leaking again," and started to let off the steam. Morse was then sitting in front and a short distance from the door. Odell had passed about five feet along the side of the cylinder when there was an explosion throwing open the door.

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Morse was found upon the door, and in such a position as rendered it certain that in the interval he had left his seat, and at the time of the explosion was turning or attempting to turn the lever or wheel attached to the bolts. It does not appear that he was directed to do this by Odell or any other person; it was his voluntary act, done while Odell had gone to let off the steam. He was badly wounded and rendered insensible. How far this act of Morse, not directed by Odell, who had charge of the work, and under whose control he was, can be treated as a careless or unauthorized meddling with the machine, or how far his act contributed to the result, we do not propose to consider, as there are other grounds for the decision of the case.

The alleged injury resulted to the plaintiff's intestate while engaged with the defendant's foreman in putting the machinery in proper working order. They were not operating it, but experimenting with a gasket to make the door tight. That the nature and object of the work in which they were engaged was known to Morse sufficiently appears from the evidence. And it nowhere appears in the evidence, and was not claimed in the argument, that he was not a competent and intelligent workman, or that it was not within the general scope of the employment of Morse and Odell and a part of their duty as machinists to put all machinery in the yard, or such new machines as might be brought there for use, into proper working order.

The only ground therefore on which the defendant can be held liable is, that it was negligent in failing to exercise reasonable and proper care and diligence in procuring the machine or in the selection of Odell, under whom Morse was acting. And on these points there is no evidence whatever of any negligence. It does not appear that the defendant did not use due diligence in purchasing the machine; or had any reason to suppose that the machine was itself unsafe, or could not be put in proper working order by its machinists. Nor was there any evidence that the defendant failed in any respect to comply with the law, and have it properly tested; on the contrary, it was tested by the proper authorities and pronounced to be sound and fit for use, and to be safe at a pressure much greater than it was subjected to at the time they attempted to adjust the gasket.

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Nor was there any evidence of negligence or want of proper care in the selection of Odell, or that he was an unfit or incompetent person; so far as his qualifications were disclosed by the evidence, he appears to have been thoroughly competent for the work he undertook to do.

The scientific and expert testimony was wholly unimportant and aside from the question involved in this controversy, which was, Did the defendant have knowledge or reason to believe that the machine was unsafe? On this question there was absolutely no evidence.

The cases relied on by the plaintiff do not sustain her position, and are not in conflict with this conclusion. In *Cayzer* v. *Taylor*, 10 Gray, 274, a fusible plug required by law was not attached to the boiler, and the defendant's negligence was established. In *Snow* v. *Housatonic Railroad*, 8 Allen, 441, the injury was caused by a want of repair in the roadbed of the corporation; and in *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282, it was held that a master might be liable to a servant for the decayed and unsafe condition of the floor of his shop. In *Gilman* v. *Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433, the corporation was liable because due care was not used in the selection of the servant whose negligence caused the injury. In *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, the plaintiff was a boy incapable of understanding the danger to which he was exposed by the machinery, and incapable of performing his work there in safety; and the defendant, knowing the danger, was held guilty of negligence in not informing him in regard to his work and the danger attending it, so as to enable him with proper care to avoid it. *O'Connor* v. *Adams*, 120 Mass. 427, was decided upon a similar gronnd. In *Ford* v. *Fitchburg Railroad*, 110 Mass. 240, it was held that, in operating a railroad, the furnishing a suitable locomotive engine was the duty of the company, which it could not avoid by delegating to servants; and in *Arkerson* v. *Dennison*, 117 Mass. 407, the case was sent to the jury upon the ground that there was evidence tending to show that the defendant had not entrusted the preparation of a staging, by the fall of which the plaintiff was injured, to another, but had retained the charge and direction of it himself, and was bound to exercise some care in regard to it, which he neglected

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to do. The case of *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466, merely asserts the general proposition that a corporation is not liable to a servant for an injury caused by the negligence of a fellow-servant; and also that a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants, does not render the corporation liable to another servant injured thereby. In *Walsh* v. *Peet Valve Co.* 110 Mass. 23, the plaintiff was at work upon a newly invented machine, which he had never seen before, in the presence of his employers, under whose direction he was acting; and it was held that if he did not know it was dangerous to move it, as they directed him to do, and they did know or ought to have known it, and gave him no warning, he could maintain an action for an injury caused thereby. *Plaintiff nonsuit.*

GEORGE W. BUSS *vs.* RICHARD B. DYER.

Suffolk. March 29, 1877. — August 30, 1878.

The owner of two adjoining lots of land built a house on each, with a chimney between them, which was built entirely on one lot, but was intended for the use of both houses, and had suitable entrances into it from each house. Afterwards, by simultaneous deeds, he conveyed one lot to A. and the other to B., describing the lots by metes and bounds, with "all rights, easements, privileges and appurtenances to the said land belonging," and with covenants of warranty against all incumbrances made or suffered by the grantor, but containing no reference to the chimney. In an action by A. against B. for taking down the chimney, the jury found that A. could have built a chimney on his own land at a reasonable cost, and returned a verdict for B. *Held*, that if A. had an easement in the chimney, it was one created by implication, as being absolutely necessary to the enjoyment of his estate; and that, on the finding of the jury, no such easement was created.

TORT for tearing down, refusing to rebuild and preventing the plaintiff from rebuilding, a chimney, in which the plaintiff claimed an easement. Writ dated March 16, 1875. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff introduced evidence tending to prove that previously to July 12, 1844, John E. Thayer and Nathaniel Thayer built a block of five wooden houses on land owned by them on

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Meridian Street, East Boston; that these houses were then or afterwards numbered from 61 to 69 on said street, inclusive; that the chimney in question, at the time the block was built, was placed between the houses numbered 63 and 65, but wholly upon the premises of No. 65, for the use of both houses, and was constructed with connections or stove-holes for each house; that on July 12, 1844, the Thayers conveyed by simultaneous deeds (which contained covenants against all incumbrances made or suffered by them) the premises No. 63 to Oliver Lewis, and the premises No. 65 to Martin Lewis, both deeds describing the premises by metes and bounds; that by mesne conveyances the plaintiff became, on March 5, 1873, the owner of the premises No. 63; that on November 14, 1874, the chimney in question was torn down by the defendant, (to whom the house No. 65 was conveyed on October 7, 1874, by the heirs of Martin Lewis,) and was never rebuilt; and that the defendant prevented the plaintiff from rebuilding, and refused to allow him to rebuild it. In none of the deeds or mesne conveyances above referred to was any specific mention made of any right to use the chimney in question, though in each the premises were conveyed with "all rights, easements, privileges and appurtenances to the said land belonging." The plaintiff claimed no right to use the chimney by prescription.

For the purpose of showing that a right to use the chimney passed by the deed from the Thayers to Oliver Lewis, by implication, as an appurtenance to the house on the premises so conveyed, the plaintiff introduced evidence tending to show that, at the time Oliver Lewis became the owner of the premises No. 63, a suitable chimney, which would be a substitute for the chimney in question, could not be built wholly upon his premises at a reasonable cost and expense; but this was contradicted by the defendant. As bearing upon this question, evidence was introduced by both parties to show what would be the cost and expense of building such a chimney at the time of the trial and at the time when the chimney was torn down.

For the purpose of showing that the right to use the chimney in question had not been lost or extinguished, the plaintiff introduced evidence to prove that the chimney and the houses of himself and the defendant were in good condition up to the time

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when the chimney was torn down; that they had not been destroyed by the elements or mere lapse of time; and that they were not in such a condition that they needed to be rebuilt from the bottom; and the defendant introduced evidence to prove the contrary, and that the plaintiff could have built a suitable chimney upon his own estate as a substitute for the one torn down at a very small cost, especially soon after the chimney had been torn down.

The plaintiff asked the judge to rule as follows: "If the plaintiff acquired a right to use the chimney in question under the deed from the Thayers to Oliver Lewis, such right so acquired was not lost or terminated until both the chimney and the houses of the plaintiff and defendant were destroyed by the elements or mere lapse of time, or were in such a condition that they had to be rebuilt from the bottom."

The judge refused so to rule; but instructed the jury that if such a right was acquired by the plaintiff through the deed from the Thayers to Oliver Lewis, yet if the chimney at the time it was torn down was unsafe and needed to be rebuilt from the bottom, the defendant had a right to tear it down, and the plaintiff could not recover. No instructions were given as to whether or not the condition of the houses of the plaintiff and defendant, or either of them, had anything to do with the duration of the alleged easement, or right to use the chimney in question, and the instructions given were objected to only on the ground of that omission. The jury were fully instructed on the other questions of law in the case; and, among other things, were instructed that no servitude, as claimed, could be created by implication of law unless there was a reasonable necessity therefor; and that if the plaintiff, with reasonable labor and expense, could have built a suitable chimney on his own estate, he could not claim a right to use that upon the defendant's premises.

The jury were further instructed to answer the following questions, and that if the second question was answered in the affirmative they need not answer the third question, but should return a verdict for the defendant: "1. Did the houses now occupied by the parties respectively exist upon the estates at the time of the deeds from the Messrs. Thayer? 2. Could the plaintiff at a reasonable cost have built a suitable chimney upon his

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own estate, as a substitute for the one he claimed to use on the estate of the defendant? 3. Was the chimney in question so defective and unsafe as to require the defendant to take it down?" The jury answered the first and second questions in the affirmative; and returned a verdict for the defendant. The plaintiff alleged exceptions.

E. T. Buss, for the plaintiff.

E. D. Sohier & C. A. Welch, for the defendant.

SOULE, J. The deed of the Thayers, under which the plaintiff claims, was made and delivered when they were owners of the premises of the defendant. It makes no mention of any rights in the chimney on the adjoining premises. Their deed of the defendant's premises, given at the same time, contains covenants against incumbrances made or suffered by the grantors, and of warranty against all persons claiming under them. Each deed describes the lot of land conveyed by metes and bounds, without mentioning any buildings. The grantors having built the houses and the chimney, and being owners of both parcels, these covenants are as strong an expression of intention to convey the defendant's premises free of the easement claimed by the plaintiff as covenants of general warranty would have been. The words, "and all rights, easements, privileges and appurtenances to the said land belonging," in the deed of the plaintiff's premises, are of no effect to carry the easement in question, because no easement existed, while the fee of both parcels was held by the same owners. *Ammidown* v. *Granite Bank*, 8 Allen, 285. Moreover, the title conveyed by that deed is not older than the title conveyed by the deed of the defendant's premises, which covenants against any incumbrance created by the grantors. If, therefore, an easement to use the chimney was created in favor of the premises of the plaintiff, it was created by implication, as being absolutely necessary to the enjoyment of the estate.

We are aware that it has been held in some English cases, that a deed of premises carries the right to continue to enjoy, as easements, all privileges or conveniences in and upon adjoining lands of the grantor, which were apparent, and had been used by the grantor in connection with the premises before the conveyance; that the conveyance is a conveyance of the premises "as

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they are." A leading case to this effect is *Pyer* v. *Carter*, 1 H. & N. 916. Similar doctrine has been held in New York. *Lampman* v. *Milks*, 21 N. Y. 505. We do not regard this as a correct view of the law.

It is a well established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed.

In this Commonwealth, grants by implication are limited to cases of strict necessity. *Carbrey* v. *Willis*, 7 Allen, 364, and cases cited. *Randall* v. *McLaughlin*, 10 Allen, 366. The case of *Pyer* v. *Carter* was denied by Lord Chancellor Westbury in *Suffield* v. *Brown*, 4 De G., J. & S. 185, which has been since recognized as containing the correct doctrine. *Crossley* v. *Lightowler*, L. R. 2 Ch. 478. *Watts* v. *Kelson*, L. R. 6 Ch. 166.

The case seems to have been tried in the Superior Court on the assumption by both parties that the obstacles, if any, to the erection of a chimney on the plaintiff's premises, were the same when the Thayers conveyed as when the chimney in question was taken down, and the question to the jury, and the instructions, appear to have been framed in accordance with that assumption, and without any objection or suggestion to the contrary by the plaintiff. We cannot, therefore, consider the objection now made, for the first time, that the question of necessity was to be determined by the state of things existing when the conveyance was made by the Thayers.

In this view of the case, it appears that the jury found that the use of the chimney was not necessary to the enjoyment of

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the premises owned by the plaintiff. This being so, no easement in the chimney was reserved by implication in the deed to the defendant's grantor, and the defendant, in destroying the chimney, merely exercised a right of ownership.

It is unnecessary, therefore, to consider the question raised by the refusal to give the instruction asked for by the plaintiff. On the facts found by the jury, no easement in favor of the premises of the plaintiff having been created, the ruling as to how such easement could be determined, if it existed, became immaterial. *Exceptions overruled.*

Hill Manufacturing Company *vs.* Providence and New York Steamship Company.

Suffolk. March 19, 1877. — Aug. 31, 1878. Lord & Soule, JJ., absent.

In an action against a carrier for the loss of goods by fire, while the goods were in a steamship at the port of destination, there was evidence that the defendant, a corporation, had a lease of the pier at which the vessel was lying; that the pier for its whole length was covered by a building, owned by the corporation, with ends and sides of pine boards, and the interior of which was open throughout; that in one room was a stove, two feet from a partition, with a stove-pipe running through the ceiling, and with no protection around either stove or pipe; that the fire was first seen coming from that room, and in a very few minutes afterwards caught and wholly consumed the steamship; and that there was no sufficient watch upon the pier or the steamship. *Held*, that the evidence would warrant a finding that the fire was caused by the neglect of the defendant. *Held, also*, that the defendant had no ground of exception to instructions to the jury that the question was, not whether any of the servants of the corporation had neglected their duties, but whether the corporation itself had done so; that the corporation was bound to furnish a suitable pier, and to use reasonable care to protect the property entrusted to it against fire; and that if it failed to do so, and the loss was occasioned by such failure, the defendant was liable.

On the issue whether piers in New York are properly constructed, evidence that piers in Boston are similarly constructed may properly be excluded.

Proceedings in a federal court under the U. S. St. of March 3, 1851, exempting ship-owners from any liability for loss by fire, not caused by their own design and neglect, and limiting their liability for losses by other causes without their privity or knowledge to the amount or value of their interest in the ship and freight, and a final decree therein forever debarring all claimants in default from prosecuting their claims for losses, are no bar to an action in a state court, by one who has not submitted himself to the jurisdiction of the federal court, against a ship-owner for a loss by fire of certain goods through his neglect.

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CONTRACT, with a count in tort, alleged to be for the same cause of action. Writ dated September 26, 1870. The count in tort alleged that the defendant, a corporation duly established by law, was a common carrier of goods and merchandise; that on May 22, 1868, it received at Providence, in the State of Rhode Island, from the plaintiff's agents, thirty cases of bleached cotton cloth, which it agreed with the plaintiff, for a reasonable compensation, to transport safely from Providence to the city of New York; that the thirty cases contained 39,691 yards of cloth, of the value of $7000; that the defendant so carelessly and negligently conducted itself that the cotton cloth, while being so transported by the defendant, was burned and injured by fire to the amount of $6000. The answer admitted that the defendant was a carrier; denied loss by negligence; set up a limitation of liability under the U. S. St. of March 3, 1851; and relied upon certain proceedings under that act, in the District Court of the United States for the Southern District of New York.

After the former decision, reported 113 Mass. 495, the case was tried in this court before *Lord*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the cotton cloth in question was delivered at Lowell to the Boston & Lowell Railroad Company, to be conveyed by railroad to Providence, Rhode Island, and thence by the defendant's line of steamers to New York; that it was delivered in Providence to the defendant on May 23, 1868, and put on board their steamship the Oceanus; that the steamship sailed that afternoon, and arrived in New York the next morning, Sunday, but none of the cargo was discharged on that day; and that on Sunday afternoon a fire, which originated in one of the defendant's buildings on the pier at which the vessel was lying, burned the steamship to the water's edge and destroyed or damaged the cloth and nearly the whole of her other cargo, which belonged to various shippers; that portions of her cargo were afterwards discharged in a damaged condition, and no freight was earned or received by the defendant on the cargo, or any portion thereof; that the damage to the cargo by the fire largely exceeded the amount or value, immediately after the fire, of the defendant's interest in the steamer, and her freight then pending; that the defendant at the time of the fire held leases of the wharf property, and was owner of the buildings thereon.

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The plaintiff contended that the fire was caused by the neglect and not by the design of the defendant; and offered evidence tending to show that at the time of the fire the pier was covered with a building between five hundred and six hundred feet long, that portion of it which covered the head of the pier being somewhat higher than the part which extended down the pier; that the sides of this building were made of pine boards painted on the outside, but not within, the roof being covered with a gravel roofing; and that the office, which was in a separate structure, standing by itself at the head of the pier within the main building with an open space between its roof and that of the main building, had wooden partitions, was occupied by the clerks employed in attending to the receipt and delivery of freight, and contained an iron stove standing about two feet from the partition, the stove-pipe running through the ceiling into a room over the office occupied by a stevedore in the employ of the defendant, and thence through the ceiling of the stevedore's room, through an open space between the top of this room and the roof of the main building, into the open air.

The plaintiff called a teamster as a witness, who testified to the foregoing details, and stated that he never saw any protection around the stove or stove-pipe, and that if there had been any such protection he should have seen it. He was not at the fire. Two firemen, called by plaintiff, testified that they received the alarm of fire at their station, and reached the premises in from three to five minutes before the fire showed itself, but when the main building was full of smoke, which apparently came from the office and the stevedore's room; that, in from three to five minutes after their arrival, they went upon the roof of the main building to cut holes through the roof, and were there from ten to twenty minutes, during which time the fire spread down the pier until it caught the steamship, which was rapidly consumed; that the steamship was not on fire when they went upon the roof first, and the fire did not catch her for some ten to twenty minutes thereafter; and that they saw no one upon the steamer except firemen, and no watchman upon the premises from the time of their arrival until the fire was extinguished; that there was no steam upon the steamship at the time of the fire, so that she could only be moved by hand; and that the wind was

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blowing out of the dock, and the tide was ebbing, so that their natural tendency was to float the steamship away from t pier. The plaintiff offered no evidence to show that there was any fire in the stove on May 24, or how the fire originated, except that the firemen testified that when they first went upon the roof, smoke was coming up out of or around the stove-pipe, they could not say which; and, without offering any other evidence, rested its case.

The defendant thereupon asked the judge to rule that, upon the evidence offered, the plaintiff could not maintain its action, and that the defendant was entitled to a verdict. The judge refused so to rule, but ruled that the case must be submitted to the jury upon the question whether the defendant, under all the circumstances of the case, had exercised reasonable and proper care in keeping the property intrusted to its charge. To this ruling and refusal to rule the defendant excepted.

The defendant thereupon offered evidence tending to show that it was necessary for the proper conduct of its business as a common carrier, and for the proper protection of goods during their receipt and delivery, and while awaiting the orders of the consignees, that the pier should be covered with a building substantially like that burned; that the buildings upon the pier were built about four years before the fire; that they were very thoroughly built; that the sides of the buildings were made of boards tongued and grooved so as to fit into each other, and the roof was so made that, when completed, it presented nothing but a surface of gravel; (the plaintiff did not contend that the roof was of improper construction;) that the interior of the building was open from one end to the other, so that a person standing at the head of the pier could see the whole length of the pier; that the lower end and sides were closed, with openings at intervals corresponding with the gangways of the steamships, which could be shut when not needed for the receipt or discharge of cargo; that within the main building at the head of the pier were two smaller buildings; that the office was in one of these buildings, the partitions being constructed of boards planed and well finished; that the remainder of the building, adjoining the office and separated from it by a partition, was divided, by a floor in the middle, into two rooms, of which the lower, opening into

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the main building, was used for the keeping of passengers' luggage, and the upper was the stevedore's room above alluded to, the ceiling of the stevedore's room being on the same plane as the ceiling of the office, and both covered by the same roof; that in the office was the stove above alluded to; that the pipe from this stove passed through the partition into a drum in the stevedore's room, and thence out through the roof; and that beneath the stove, between it and the partition, and between the stove-pipe and the partition for the entire length of the former, zinc had been put as a protection; that the pipe passed through the partition through a double cylinder of tin, so arranged with holes as to allow a circulation of air between the two cylinders; that there was a similar protection where it passed through the roof, and that this was a sufficient protection against fire from the stove, and, although hot fires had been built in the stove for some years, there had never been any indication of undue heat to the partition, ceiling or roof; that there were on the pier four hydrants, connected by pipes with the main water-pipe in the street, each provided with sufficient hose, which were in good order on the day of the fire, and could be brought into use in one minute by one man; that on the day of the fire, the openings on the sides of the building over the pier were shut, except three which were open, one to afford an entrance to each of three steamships then lying at the pier, and that the entrances to the building from the street were closed; that there was on the wharf a regular watchman, who was there at the time of the fire, sitting inside the buildings where he could see the whole pier, which on that day was clear from freight; that the Oceanus was provided with all the means for extinguishing fire required by the laws of the United States, and had three pumps, two hand-pumps, one near the bow and another near the stern, and one steam-pump near the centre of the ship, each provided with a proper equipment of hose, which was kept actually connected with the hand-pumps, and was so connected at the time of the fire; that upon reaching her dock on the day of the fire, the fires under her boiler had been drawn, in order that the boilers might be cleaned; that this operation had been finished, and the hands were in the act of filling the boilers when the fire broke out; that it was necessary for the safety of the vessel to clean the

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boilers once a week; that it was the rule that this should be done on Sunday morning, and no fires could be lighted under the boilers until they had been fully filled again, without danger of an explosion; that during this operation the boat could not be moved by steam; that the full complement of the steamship was fifty-four men, including the officers, which were a captain, first and second mates, first and second engineers, first and second pilots, steward, and some minor officers; and that at the time of the fire, all were on board, except the captain and chief engineer, and were in various places on the vessel.

There was no evidence that any one was in command of the vessel at the time of the fire, unless it is to be inferred that the first mate was in command in the absence of the captain; nor that any special order had been given to keep watch on board, or that any regulations had been established in reference to the breaking out of fire on the ship or the wharf. But there was evidence that a watch was always kept on the ship, and that the fire was first discovered by some of the men on board, when it was confined to the stevedore's room, some thirty or forty feet from the stern of the ship; that thereupon the lines which held the steamship to the wharf were immediately cast off, the pumps manned, and a stream of water played upon the sides of the steamship, the capstan manned by all the men who could get hold of it, a line being attached from it to a post at the head of the pier; and that the fire spread so rapidly that the steamship could only be moved fifteen or twenty feet before the men were driven from her by the fire, the capstan being near the forward end of the vessel; the mate and others testifying that only twelve to fourteen minutes elapsed from the time the fire was first discovered in the stevedore's room until the men left the vessel. The evidence showed that everything was done by the men on board which could be done to save the vessel. Much evidence was introduced to show what was done, but the plaintiff did not contend that the officers and men in charge of the vessel were guilty of any negligence in failing to save her, or that she was not properly equipped with means for extinguishing fire. The assistant engineer testified that the fire went like a flash, and that the men were driven from the capstan in about six minutes from the time when he first saw the fire in the

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stevedore's room, thirty-five or forty feet from the steamship. There was evidence that the fire, when first discovered, was in the stevedore's room and that the smoke and fire, when first seen by the officers of the steamship, were coming up out of or near the stove-pipe; and the defendant offered the evidence of witnesses, who examined the premises after the fire, with a view of ascertaining the cause of it, to the effect that the office in which the stove stood was not touched by the fire; that the stove and the stove-pipe through its entire length were undisturbed; that there was no sign of fire or scorching in the partitions, ceiling or roof, where the stove-pipe passed through, but that it and all its appurtenances remained after the fire as before; that there was a hole in the ceiling of the stevedore's room and the roof overhead, but that it was two or three feet from the stove-pipe; and that the fire apparently originated in the baggage room under the stevedore's room. There was no other evidence, except this, as to the cause or origin of the fire.

The defendant also introduced evidence tending to show that at the time of the fire all other steamship companies, whose routes ended in New York, had their piers covered; that every pier then covered in New York was covered with a wooden building; and that the building which covered the defendant's pier was in no way inferior in construction, size, material or other respects affecting its liability to burn, to the buildings upon the other piers in New York, but on the contrary was better.

The defendant also offered to show by various witnesses that, at the time of the fire, companies and persons engaged in the same business as the defendant and having routes with a terminus in Boston, used covered wharves at Boston, and covered them with wooden sheds of the same construction and character as that which covered the defendant's pier; and that there was no difference between the circumstances, including the danger of fire, under which such buildings were used in Boston, and the circumstances under which the defendant used its building. This evidence was offered for the purpose of showing the care exercised and precautions employed generally at the time of the fire by persons and corporations engaged in the same business and subject to the same responsibilities as the defendant. The judge excluded the evidence, and the defendant excepted.

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The fire marshal of New York testified that the building on the pier operated like a horizontal chimney, and that when he arrived at the spot, which was from thirty-five to forty minutes after the bells gave the alarm, he found the part of the building on the pier on fire, with intense heat, and also the vessel.

There was no evidence that any regulations had been established by the defendant in reference to the use of the pumps on the steamer or the hydrants on the wharf in case of fire, or that the watchman had received any instructions as to his duties in case of fire, or any other than general instructions to watch the whole pier. The watchman was not called, nor was his absence accounted for. It appeared that he was no longer in the employ of the defendant, and had not been seen for several years, and there was no evidence to show that any of the defendant's agents or servants knew where he was. The mate and other officers of the steamship testified that the tide had very little force where the steamer lay, owing to the piers above, and that the wind and tide at the time of the fire would have had no appreciable effect in taking the steamship out of the dock.

The defendant put in evidence the record of proceedings upon the libel and petition of the defendant, filed on May 14, 1872, in the District Court of the United States for the Southern District of New York, under the U. S. St. of March 3, 1851, §§ 3, 4, and the 54th–57th Rules of Practice in Admiralty of the Supreme Court of the United States, claiming the benefit of the limitation of liability provided in the act of Congress. The record showed that the libel set forth the facts and circumstances; that upon this libel the District Court caused an appraisement to be had of the amount of the defendant's interest in the steamship and in her freight for the voyage, and made an order for the giving of a stipulation, with sureties, for its payment into court whenever ordered; that the defendant entered into a stipulation in conformity with the order, and a monition was issued against all persons claiming damages for the loss occasioned by the fire on board the steamship, citing them to appear before the court, and make proof of their claims, on or before October 15, 1872, and ordering public and other notice of the monition; that this notice had been served on the plaintiff as well as on all other claimants; that the court made an order upon the plaintiff and

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the other claimants, which had been served, restraining the further prosecution of all and any suit or suits against the defendant in respect of any such claim or claims; and that the court made a final decree by which all persons in default, by reason of their failure to prove their claims, were forever debarred from prosecuting such claims. It was admitted that the process and restraining order issued on the defendant's libel and petition were duly served on the plaintiff.

The defendant asked the judge to rule that, upon the whole evidence, the plaintiff could not maintain its action, and that the jury must find for the defendant; but the judge refused so to rule.

The defendant then asked the judge to instruct the jury as follows: "1. Under the proper construction of the act of Congress entitled 'An act to limit the liability of ship-owners, and for other purposes,' U. S. St. March 3, 1851, the libel and petition of the defendant, filed in the District Court of the United States for the Southern District of New York, and the proceedings had thereon, are a bar to the plaintiff's action. 2. Under the proper construction of said act of Congress, the plaintiff is precluded from maintaining its action by said proceedings in said District Court. 3. By the decree of said District Court, made upon said libel and petition, and the subsequent proceedings thereon, it has been adjudged, as between the parties to the present suit, that the fire which caused the damage for which the plaintiff seeks to recover, was not caused by the design or neglect of the defendant within the meaning of said act of Congress. 4. There is no evidence that said fire was caused by the design or neglect of the defendant within the true construction of the said act. 5. Under said act the defendant is not liable, unless the fire on board the Oceanus was occasioned by the design of the owners thereof, or their neglect in respect of the construction, equipment or manning of the vessel. 6. The neglect referred to in said act is a neglect in respect of the vessel herself, and not neglect in respect of any arrangements which may be made for the protection of cargo before it is put on board, or after it is taken out of the vessel. 7. It is not neglect of the owners of a vessel, within the meaning of said act, to permit her, upon her arrival in her port of destination, to be attached to a pier covered by a

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shed, constructed in the manner usual and customary for such vessels in such port. 8. There is no evidence of neglect of the owners of the Oceanus, within the meaning of said act, in respect of the place where said vessel was attached. 9. There is no evidence in the case of neglect on the part of the owners of the Oceanus, within the meaning of said act, in respect of the construction or maintenance of the buildings at the head of the pier, or upon the pier itself. 10. If the fire originated in the buildings on the shore, and communicated to the steamer by the shed upon the pier, the defendant is not liable. 11. Unless the fire itself was originally caused by the neglect of the defendant, the defendant is not liable. 12. If the fire did not originate in the steamer Oceanus, the defendant is not liable."

The judge refused to give these instructions; but, after stating to the jury that the question before them was whether the fire which caused the damage complained of was occasioned by the neglect of the defendant, instructed them as follows: "It becomes necessary for you to inquire whether there was any negligence on the part of the defendant corporation; not whether any of the servants of that corporation, while performing the duties which the corporation imposed upon them, have been guilty of misconduct or negligence, but whether the corporation itself has been guilty of any misconduct. The corporation is the owner, and the liability of the corporation is the exact liability of the owner. The corporation provides ships, docks, piers and places for the transaction of the business incident to its enterprise. Now, if there is a failure to do what is proper for the reasonably setting in motion and carrying on the business of the corporation, that is in law a neglect of the corporation. The case here rests upon the provision made by the corporation for the purpose of doing the business. It is like the case of a railroad company that is bound to furnish the railroad with a good roadbed, with a properly constructed road, with a suitable equipment, with a proper depot. A neglect to furnish either of these is a neglect of the corporation itself in providing means by which the business is properly to be done. Was the corporation guilty of neglect? The plaintiff contends that the arrangements made for carrying on its business were unsuitable and unsafe; in the first place, in having a structure so large, and of such combus-

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tible material, thus placed by the side of the dock upon the pier, and in having means in it for heating which were unsafely provided; and, in addition, that the corporation had failed to make such proper regulations as it was their duty to make to provide against such a contingency as happened, which men of prudence should have anticipated. Whether it was guilty of neglect, is a question for you. The corporation was bound to act reasonably under all the circumstances of the case. The place where the property was, the circumstances surrounding it, whether a dense or a sparse population, whether easy or difficult of access for removal in case of danger, the value of the property, are all elements for your consideration in determining whether the defendant did or did not use reasonable care to protect the property against fire. If it did not, and if, further, you are satisfied that the want of that reasonable care was what caused the destruction of the plaintiff's property, then the defendant is liable. The plaintiff must satisfy you of two propositions: that the defendant neglected the proper means, the reasonable and proper precautions, which should have been taken against fire; and that by reason of that failure to take proper precautions against it, its property was destroyed. If it has satisfied you of both these propositions, your verdict must be for the plaintiff; otherwise, for the defendant."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

M. Storey, for the defendant.

J. G. Abbott, for the plaintiff.

GRAY, C. J. The plaintiff contended and the jury have found that the fire which destroyed the plaintiff's goods was caused by the neglect of the defendant corporation.

There was evidence tending to show that the defendant's pier was covered for its whole length by a building with ends and sides of pine boards, and the interior of which was open throughout, so as to operate, as the city marshal testified, like a horizontal chimney; that in one room was a stove, two feet from a partition, with a stove-pipe running through the ceiling, and with no protection around either stove or pipe; that the fire was first seen coming from that room, and, in a very few minutes afterwards, caught and wholly consumed the steamship and her

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cargo; and that there was no sufficient watch upon the pier or the vessel.

There can be no reasonable doubt of the sufficiency of the evidence to warrant the verdict, and it was submitted to the jury with suitable instructions.

The testimony as to the structures on wharves in Boston might rightly be excluded by the presiding judge, as tending to raise collateral issues upon the question how far the circumstances of those cases corresponded to those of the case on trial.

The act of Congress of March 3, 1851, exempting ship-owners from any liability for loss by fire not caused by their own design or neglect, and limiting their liability for losses by other causes, without their privity or knowledge, to the amount or value of their interest in the ship and freight, does not diminish or in any way affect their liability at common law for injuries caused by their own neglect.

In § 1, which takes away the owners' liability for loss or damage to goods "by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners," the words "such fire" evidently refer to the previous words, "fire happening to or on board;" and if the neglect of the owners is the cause of the fire's breaking out on the ship, it is wholly immaterial whether and how the fire originated elsewhere.

The provisions of § 4 of the act of Congress, and the rules of the Supreme Court of the United States for apportioning the sum, for which a ship-owner may be liable, amongst the parties entitled thereto, apply only to claims which are limited by § 3 of the act. A proceeding in admiralty under that section and those rules is substantially a proceeding *in rem* for the distribution of a fund, and does not determine the question of the owner's liability, except to those whose claims are limited by the act, or possibly others who voluntarily become parties to the cause. It cannot affect the rights of those who have not submitted themselves to the jurisdiction, and whose claims are not limited to the amount to be distributed, but rest upon the owner's personal liability at common law as a wrongdoer. The proceedings and decree in the District Court of the United States for the Southern District of New York do not therefore bar this

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action. *Hill Manuf. Co.* v. *Providence & New York Steamship Co.* 113 Mass. 495. *Knowlton* v. *Providence & New York Steamship Co.* 53 N. Y. 76. *Salisbury Mills* v. *Townsend*, 109 Mass. 115. *Haines* v. *Carpenter*, 91 U. S. 254. *Dial* v. *Reynolds*, 96 U. S. 340. *Exceptions overruled.*

Inhabitants of Malden *vs.* Inhabitants of Melrose.

Middlesex. Jan. 8. — Aug. 30, 1878. Ames & Lord, JJ., absent.

After the Prov. St. of 1767 (7 G. III.), c. 3, § 4, and before the St. of 1789, c. 14, no person could gain a settlement by residence in a town for any length of time, although not warned away, without obtaining the approbation of the town at a general meeting.

In an action by one town against another, for the support of a pauper, it appeared that, by the St. of 1850, c. 309, the defendant town was set off from the plaintiff town; that the grandfather of the pauper in 1785 bought an estate of the clear annual income of three pounds in that part of the town which became the defendant town by the division, and resided there until his death in 1831; that his son, the father of the pauper, came to the plaintiff town with his father, and in 1815 moved with his family on to a place which is now in the plaintiff town, and in 1823, bought and moved on to a freehold estate in that part of the town which remained within the limits of the plaintiff town on its division, and resided there continuously with his family, including the pauper, until 1832, when he and his family moved to another town; and that the pauper was absent from the plaintiff town when it was divided, and his last dwelling place in the town was in that part of it which remained the plaintiff town after its division. *Held*, that by the St. of 1789, c. 14, the grandfather acquired a settlement by his two years' ownership and residence; that this settlement was derived by the pauper; that the effect of such settlement was not changed by the fact of the removal of the father of the pauper to another part of the old town or to another town, and of his absence when the town was divided; and that, by the St. of 1850, c. 309, § 3, which provides that the two towns "shall be respectively liable for the support of all persons who now do, or hereafter shall, stand in need of relief as paupers, whose settlement was gained by, or derived from, a settlement gained or derived within their respective limits," the pauper was chargeable to the defendant town.

Contract upon an account annexed for the support of Ezra Waitt and George W. Waitt, two paupers. Answer, a general denial. Trial in the Superior Court, before *Pitman*, J., who reported the case for the consideration of this court, in substance as follows:

The plaintiff offered to show that Ezra Waitt, the grandfather of the paupers, came to Malden from Lynn in 1788, and moved

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on to the "Pratt Place," so called, in what is now Malden, which he bought on February 4, 1783; that on February 23, 1784, a warrant was issued by order of the selectmen of Malden, and served on Ezra Waitt, to warn him and his family to depart from the town; that on February 28, 1785, he sold the "Pratt Place," and on March 22, 1785, bought the "Ireson Place," so called, in that part of Malden which became Melrose by the St. of 1850, *c.* 309, and resided there until his death in 1831; that the clear annual income of each of these places was ten pounds during the period it was occupied by him; that his son, Ezra Waitt, the father of the paupers, was born in Lynn on February 8, 1781, came to Malden with his father, and in September, 1815, moved with his family on to a place which is now in Malden, and on January 25, 1823, bought and settled on a freehold estate in that portion of the town which remained within the limits of Malden on its division by the St. of 1850, and resided there continuously with his family, including the paupers, until 1832, when he and his family moved to Boston; that Ezra Waitt, one of the paupers, was born on March 28, 1810, and George W. Waitt, the other, was born on January 24, 1813; that they were absent from Malden when the town was divided; and that their last dwelling place in the town was in that part of it which remained Malden after the division.

Upon this evidence, the judge ruled that the plaintiff could not recover; and directed a verdict for the defendant. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside.

J. W. Pettengill, for the plaintiff.

F. S. Hesseltine, for the defendant.

COLT, J. The settlement of the paupers, for whose support this action is brought, is in Melrose. It is derived from their grandfather, who first gained a settlement in that part of the old town of Malden which, upon the incorporation of Melrose, in 1850, was set off to that town. The grandfather came to Malden on February 4, 1783, and bought the "Pratt Place" in what is now Malden, where he continued to live for more than two years. But he gained no settlement thereby, because after the Prov. St. of 1767 (7 G. III.) *c.* 3, § 4, and before the St. of 1789, *c.* 14, no person could gain a settlement by residence for

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any length of time, although not warned away, unless he obtained the approbation of the town at a general meeting. Between the years named there was no mode of acquiring a new settlement but by such approbation. *Granby* v. *Amherst*, 7 Mass. 1. *Salem* v. *Andover*, 3 Mass. 436. *West Springfield* v. *Granville*, 4 Mass. 486. Leavitt's Summary, 22. After leaving the "Pratt Place" he bought the "Ireson Place," in that part of Malden which became Melrose, and resided there until his death in 1831. The clear annual income of this estate was more than three pounds during the time of his occupancy; and, under the provisions of the St. of 1789, *c.* 14, the grandfather acquired a settlement by his ownership of and residence upon it for two whole years.

The effect of the settlement thus gained by the grandfather is not changed by the fact that the father of these paupers in 1815 removed with his family to that part of the old town which is now Malden and bought a freehold estate there, upon which he resided until 1832; and that he and his family removed to Boston, and were absent when Malden was divided, not having gained a settlement elsewhere. A settlement once acquired is not affected by a removal to another part of the same town. *Dalton* v. *Hinsdale*, 6 Mass. 501. *Princeton* v. *West Boylston*, 15 Mass. 257.

Section 3 of the St. of 1850, *c.* 309, by which the town of Melrose was incorporated, provides that the "towns of Malden and Melrose shall be respectively liable for the support of all persons who now do, or hereafter shall, stand in need of relief as paupers, whose settlement was gained by, or derived from, a settlement gained or derived within their respective limits." This special act must control the provisions of the Gen. Sts. *c.* 69, § 1, *cl.* 10, which declare that "upon the division of a city or town, every person having a legal settlement therein, but being absent at the time of such division, and not having acquired a legal settlement elsewhere, shall have his legal settlement in that place wherein his last dwelling place or home happens to fall upon such division." This provision was a reënactment of the Rev. Sts. *c.* 45, § 1, *cl.* 10, which was in force when the special act was passed, and the general law in its application to these towns is changed by that act. The act pro-

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vides not simply a rule for determining how the future pauper expenses of the two towns shall be apportioned, as in *Westborough* v. *Rehoboth*, 4 Cush. 185; nor is it confined in its application, as in *Hanson* v. *Pembroke*, 16 Pick. 197, to a class of persons which would not include these paupers. See also *North Andover* v. *Groveland*, 1 Allen, 75. It embraces all persons who shall stand in need of relief, and extends to settlements within the respective limits of the two towns, both derivative and acquired. It would be a forced construction to hold that it was not the intention to change the general laws relating to pauper settlements in reference to these towns.

The result is, that these paupers, deriving their settlement through father and grandfather from the "Ireson Place" in Melrose, are chargeable to that town. *Verdict set aside.*

GEORGE M. BROOKS, Judge of Probate, *vs.* ABRAHAM JACKSON & others.

Middlesex. January 21. — August 31, 1878.

Under the Gen. Sts. *c.* 98, § 8, an executor is bound to account in the Probate Court for rents of real estate received by him from the time of the death of the testator, and his failure to account for and pay over the same is a breach of his bond, for which he and his sureties are liable; but if he is removed from office, they are not liable for rents collected by him after his removal.

A provision in a will charging and binding the real estate of a testator for the payment of legacies, and empowering the executor to sell it to pay such legacies, does not affect the rights of the heirs or devisees in the rents until the power is executed by a sale.

In an action on a probate bond, it appeared that A. was duly appointed, by the Probate Court, executor of the will of B.; that afterwards A. was removed for cause, in not rendering an account to the Probate Court, from his office of executor, and an administrator *de bonis non*, with the will annexed, was appointed in his place; that A., in his capacity as executor, received rents of the real estate of B. to a large amount, and made disbursements in reference to the estate; and that, in accordance with a power contained in the will, he made endeavors to sell the real estate. *Held*, that there was nothing in the case to show that the judge before whom it was tried erred in disallowing a claim on the part of A. for compensation for his services as executor.

CONTRACT on a bond, in the usual form, given by Abraham Jackson as principal, and William E. Underwood and William

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Carpenter as sureties, conditioned that Jackson, who had been appointed executor of the will of Joanna Latham, should make and return an inventory of the estate of the testatrix, administer the estate according to law and render an account. The breaches alleged were that the executor had neglected to return an inventory of the estate, had not administered the estate according to law and had failed to account. Judgment was entered for the plaintiff for the penalty named in the bond; and, at a hearing in this court, before *Ames*, J., without a jury, to determine the sum for which execution should issue, the following facts appeared:

On September 24, 1872, Jackson was duly appointed, by decree of the Probate Court, executor of the last will of Joanna Latham. On appeal to this court, the decree was affirmed, and on November 3, 1873, letters testamentary were issued to Jackson, and he gave the bond declared on.

On April 6, 1875, Jackson was removed, for not rendering an account to the Probate Court, as required by law and the order of the court, from his office of executor, and an administrator *de bonis non*, with the will annexed, appointed in his place, for whose benefit this action is brought.

The judge found that Jackson had received, of moneys belonging to the estate, $6580, and was entitled to credit for $5472.78 for disbursements in reference thereto; and that the plaintiff was entitled to recover $1107.22, and interest thereon from April 6, 1875.

It appeared that Jackson demanded as executor, collected and received rents of the real estate of the testatrix to the amount of $1454.20, of which $570 were received before November 3, 1873, and $170 after his removal from office, for which he receipted sometimes "Abraham Jackson," and at others "Abraham Jackson, executor;" that a part of the estate was let to a tenant at the time of the death of the testatrix, which tenant paid rent to Jackson so long as he remained executor; that the residue of the premises Jackson let to tenants at will; that he made no arrangements with the heirs of the testatrix in respect to the real estate; that they gave no express consent to his management of it, and made no objection thereto, although well knowing of his proceedings; and that he had no express author-

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ity for his doings, unless by the will of his testatrix, which contained the following clause: "For the payment of the legacies above given, I do hereby charge and bind my real estate, consisting of house and land numbered 106 Auburn Street in that part of Cambridge known as Cambridgeport, and I hereby empower and direct my executor hereinafter named and appointed, as soon as conveniently may be after the probate of this my will, to dispose of, bargain, sell and convey all my said real estate, and from the net proceeds of said sale to provide for and to pay the above legacies." During all the time Jackson was executor, he was endeavoring to effect a sale of the real estate, but did not accomplish it. The real estate of which the rents were collected was the real estate referred to in the will, and Jackson was not an heir of the testatrix. After the removal of Jackson from office, he filed with the register of probate a paper purporting to be an account as executor, which was not considered by the Probate Court, and in which he did not charge himself with the rents aforesaid.

The defendants contended that Jackson should be credited with a reasonable compensation for his services as executor. But the judge disallowed this; ruled that the defendants were not liable for the rents collected by Jackson; and reported the case for the consideration of the full court, execution to issue for such sum as the court should order, or the case to be referred to a master to determine the same.

W. A. Herrick, for the plaintiff.

J. Cutler, for the defendants.

GRAY, C. J. In the absence of special devise or contract, the rents and profits of the real estate of a deceased person belong to his heirs or devisees, and not to his administrator or executor, even if the estate is insolvent, unless and until the real estate is sold for the payment of debts, under a power expressed in the will or by license of court; and if the executor or administrator receives such rents, the heirs or devisees may recover them from him in an action at law. *Gibson* v. *Farley*, 16 Mass. 280.

It has been provided by statute, that if the executor or administrator uses or occupies any part of the real estate, he shall account for the income thereof as ordered by the Probate Court, with his assent and the assent of such other parties interested as

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are present at the rendering of the account; and that, if the parties do not agree, the sum to be allowed shall be determined by commissioners appointed by that court. Gen. Sts. *c.* 98, § 8. Rev. Sts. *c.* 67, § 6. St. 1789, *c.* 11, § 2.

This provision has always been construed as applying as well to rents received by the executor or administrator, as to the use of real estate occupied by him in person; and we can have no doubt that it extends to his occupation or receipt of rents from the time of the death, to which his appointment relates. It requires him to account for rents and profits received or enjoyed by him to none but those to whom they belong; and if he is himself the heir or devisee, he is not obliged to account for them at all. When he is not himself heir or devisee, he is required by the statute to account for them in the Probate Court, but to the heirs or devisees only, unless they, either expressly, or by implication from assenting to his accounts in which he has charged himself with rents as part of the general assets, have agreed that they shall be applied to the payment of debts, legacies and expenses of administration, in which case he is chargeable accordingly. *Stearns* v. *Stearns*, 1 Pick. 157. *Newcomb* v. *Stebbins*, 9 Met. 540, 544. *Palmer* v. *Palmer*, 13 Gray, 326, 328. *Alden* v. *Stebbins*, 99 Mass. 616. *Almy* v. *Crapo*, 100 Mass. 218. *Towle* v. *Swasey*, 106 Mass. 100. *Choate* v. *Arrington*, 116 Mass. 552.

The provision in the will, by which the testatrix charged and bound her real estate, and authorized her executor to sell it, had no other force than to create a lien upon the estate, and a power to sell it to satisfy that lien. It did not affect the right of heirs or devisees in the rents until the power was executed by a sale. *Newcomb* v. *Stebbins*, above cited. *Lobdell* v. *Hayes*, 12 Gray, 236.

The rents received by Jackson in this case, from the time of the death of the testatrix to the time of his own removal from the office of executor, and which he was required by the statute to account for in the Probate Court, either to the heirs or devisees, or as part of the general assets, were goods not administered, which the administrator, with the will annexed, was entitled to receive from him; and the executor's failure to account for and pay over the same was a breach of his bond, for which

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he and his sureties are liable. But the rents collected by him since his removal were not received by him as executor, or in any sense to be accounted for as such, and for them he cannot be charged in this action.

There is nothing in the case to show that the judge before whom the hearing was had erred in disallowing compensation to Jackson for his services as executor.

Pursuant to the terms of the report, the case is to be referred to a master to compute, according to the rules stated in this opinion, the amount for which *Execution shall issue.*

OLIVER DICKSON & another, executors, *vs.* UNITED STATES OF AMERICA & others.

Suffolk. Nov. 22, 1877; Jan. 7. — Aug. 31, 1878. COLT & LORD, JJ., absent.

The will, dated January 7, 1862, of a citizen of this Commonwealth, contained the following clause: "Wishing to contribute my mite towards suppressing the rebellion and restoring the Union, I give and devise the rest and residue of my estate to the United States of America." The residue consisted of land in this and in another state, and of personal property; and the executors, acting for the benefit of the estate and by the consent of all parties in interest, had managed and received the rents of all such land. *Held*, on a bill in equity by the executors to obtain the instructions of the court, that the devise and bequest was absolute, and that the fact that the rebellion had been suppressed before the death of the testator was immaterial; that there being nothing in the law of this Commonwealth to prevent the United States from taking by devise, it could so take; and that, in the absence of evidence, the law of the other state was to be presumed to be the same as our own.

BILL IN EQUITY filed April 4, 1877, by the executors of the will of John Gardner of Boston, who died March 16, 1876, against the United States and the heirs at law of the testator, to obtain the instructions of the court as to the validity and effect of the residuary clause in a will dated January 17, 1862, and admitted to probate April 17, 1876, by which the testator, after making certain legacies and providing for the payment of certain annuities, provided as follows: "Fifth. Wishing to contribute my mite towards suppressing the rebellion and restoring

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the Union, I give and devise the rest and residue of my estate, after paying the donation and providing for the payment of the annuities aforesaid, to the United States of America."

All the parties submitted the case to the decision of the court upon the following facts: The residue of the estate of the testator, after payment of debts, legacies and expenses of administration, and providing for the annuities, is of considerable amount, consisting partly of real estate, situated in this Commonwealth and in the State of Iowa, and partly of personal estate. The plaintiffs have, for the benefit of the estate, and with the consent of all the parties in interest, managed the real estate in question and collected the rents thereof, and now have in their hands moneys arising from such rents, for which it is their duty to account, either to the United States or to the heirs at law. *Morton*, J., entered a decree in favor of the United States; and the heirs at law appealed.

C. C. Read, for the heirs at law. 1. The gift to the United States is not an absolute gift. In determining the character of a gift, we must examine carefully the language of the testator, and consider the purpose which he had in mind, the party whom he intended to benefit, and the occasion which prompted him to give. The gift was made during the late rebellion, and its purpose is expressed; and the fact that this expressed purpose precedes the gift itself clearly shows that the gift is not an absolute gift. The rebellion was suppressed and the Union restored more than ten years before the testator's death; and of this the court will take judicial notice.

In all cases where money has been so applied to the public debt, or for the benefit of the country, the testator has expressly so applied it. *Thellusson* v. *Woodford*, 4 Ves. 227. *Nightingale* v. *Goulburn*, 5 Hare, 484. *Newland* v. *Attorney General*, 3 Meriv. 684. *Ashton* v. *Langdale*, 15 Jur. 868. *United States* v. *Fox*, 94 U. S. 315.

The immediate purpose and the ultimate object of the testator having been fully accomplished long before his death, and there being no expression of intention to apply the gift to any other purpose, or to make it absolute, the gift fails, and the residue of his estate must go to his heirs at law. *In re Ward's Trusts*, L. R. 7 Ch. 727.

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2. The right to dispose of property by last will and testament in this state is not absolute and unlimited. *Fosdick* v. *Fosdick*, 6 Allen, 41. Article 9 of the Amendments of the Constitution of the United States provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." And by article 10, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Among the enumerated powers of the United States, that of taking by devise is not included, and such power cannot be implied. See argument of counsel in 94 U. S. 319. The right of the government to take land by grant, for a governmental purpose, does not include the power or capacity to take by devise. *Jackson* v. *Hammond*, 2 Caines Cas. 337. *Auburn Theological Seminary* v. *Childs*, 4 Paige, 419. *McCartee* v. *Orphan Asylum*, 9 Cowen, 437. *Downing* v. *Marshall*, 23 N. Y. 366, 383, 385. *Levy* v. *Levy*, 33 N. Y. 97, 122. *In re Fox's Will*, 52 N. Y. 530, 533.

G. P. Sanger & P. Cummings, for the United States.

GRAY, C. J. The single question in this case is whether the residuary devise and bequest to the United States of America is valid; and upon this question, after full examination of the authorities cited in the learned argument for the heirs at law and next of kin, we can have no doubt.

The introductory clause of this devise and bequest merely expresses the motive of the testator, and in no way defines or limits the purposes to which the property may be applied by the devisee.

In England, bequests for the benefit of the country, or for the payment of the national debt, have always been held valid. *Newland* v. *Attorney General*, 3 Meriv. 684. *Nightingale* v. *Goulburn*, 5 Hare, 484, and 2 Phillips, 594. *Ashton* v. *Langdale*, 15 Jur. 868. While Massachusetts was an English colony, that eminent common lawyer, Serjeant Maynard, gave an opinion that a bequest "to the public use of the country of New England" was a good bequest. 1 Hutchinson's Hist. Mass. (2d ed.) 101, *note*.

The property or money, when received by the United States, must doubtless be applied to public purposes authorized by the

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Constitution and laws. But the right to receive money or property, voluntarily contributed, is not a separate power, but a capacity belonging to the United States as a body politic and incident to the right of sovereignty, and to which may be applied the words used by eminent judges in speaking of the implied capacity of the United States to enter into contracts.

Chief Justice Marshall said, "The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but, while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institution. It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States." *United States* v. *Maurice*, 2 Brock. 96, 109.

So Mr. Justice Story, delivering the judgment of the Supreme Court upon the question "whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided for by some law," said, "Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers." "To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal." *United States* v. *Tingey*, 5 Pet. 114, 128.

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In later cases, these views have been repeatedly affirmed, and held to cover the taking of security for debts to the United States. *United States* v. *Bradley*, 10 Pet. 343, 359. *United States* v. *Linn*, 15 Pet. 290, 311. *Neilson* v. *Lagow*, 12 How. 98, 107, 108. *United States* v. *Hodson*, 10 Wall. 395, 407, 408. Upon the same principle, the power to take property by the right of eminent domain for the public use has been declared by the Supreme Court to exist in the United States, not by virtue of any express grant in the Constitution, but as an inherent attribute of sovereignty. *Kohl* v. *United States*, 91 U. S. 367.

In *Cotton* v. *United States*, 11 How. 229, 231, Mr. Justice Grier said, "Every sovereign state is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal." The Smithsonian Institution at Washington was created by the bequest of an Englishman, established by a decree of Lord Langdale as Master of the Rolls, and accepted by act of Congress. *President of United States* v. *Drummond*, cited in *Whicker* v. *Hume*, 7 H. L. Cas. 124, 155. U. S. Sts. July 1, 1836; August 10, 1846. To hold that the supreme government of the country, vested by the Constitution with the power to levy and collect taxes and duties to pay the debts and provide for the common defence and general welfare of the United States, and to borrow money on the credit of the United States, and capable of making contracts and of accepting security for debts, and, in case of necessity, of taking private property by the right of eminent domain, has no capacity to receive a voluntary devise or bequest, is a conclusion that nothing short of an express statute or a binding judicial decision could justify us in adopting.

The decision in *United States* v. *Fox*, 94 U. S. 315, affirming *S. C.* 52 N. Y. 530, by which it was held that a devise by a citizen of New York of real estate in New York to the government of the United States was void, proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state. That decision has no application to this case. The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees; and there is no evidence

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before us that any such restriction is made by the law of Iowa, where the rest of the real estate is situated. Gen. Sts. *c.* 92, §§ 1, 2. *Jackson* v. *Phillips*, 14 Allen, 539, 552, 589, 591. *Fellows* v. *Miner*, 119 Mass. 541. *Lorings* v. *Marsh*, 6 Wall. 337, 355. *Ould* v. *Washington Hospital*, 95 U. S. 303.

We have had some hesitation in expressing an opinion upon the validity of this devise so far as it affects rents of real estate, with which executors ordinarily have no concern, and derived in part from lands situated in another state. But as it appears that the executors, acting for the benefit of the estate and by the consent of all parties in interest, have managed and received the rents of the lands there as well as of the lands here, they are obliged, under the laws of this Commonwealth, to account in its courts for all the rents so received. Gen. Sts. *c.* 98, § 8. *Brooks* v. *Jackson*, *ante*, 307. The sum received by them for such rents being subject to our jurisdiction, we cannot avoid the duty of expressing an opinion on the validity of the whole devise upon which the right to such rents depends.

Decree affirmed.

WALTER FESSENDEN *vs.* CALEB NICKERSON.
EDWARD S. SAFFORD *vs.* CITY OF BOSTON.

Suffolk. June 27, August 27. — August 31, 1878.

The St. of 1878, *c.* 173, providing that the compensation awarded to auditors by this court or the Superior Court shall be paid by the county, and shall not be taxed in the bill of costs of either party, applies to a case in which final judgment had not been rendered, nor the compensation of the auditor awarded, before the statute took effect, although he had been appointed and had returned his report before that date.

GRAY, C. J. By the Gen. Sts. *c.* 121, § 50, "the court shall award reasonable compensation to auditors, to be paid by the plaintiff and taxed in his bill of costs if he prevails." By the St. of 1867, *c.* 67, that section was amended so that such compensation might be paid by either party, and taxed in his bill of costs if he prevailed. By the St. of 1878, *c.* 173, the same section is further amended "so that the compensation awarded by the Supreme Judicial and Superior Courts to auditors appointed

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by those courts shall be paid by the counties in which they are appointed, and shall not be taxed in the bill of costs of either party to the action;" and it is provided that the St. of 1867, c. 67, shall have no application to auditors appointed by either of these courts. The party upon whose suit or application an auditor is employed may well be liable to pay him a reasonable compensation for his services; but such compensation cannot be recovered against the other party as costs in the cause, except as allowed by statute. *Baker* v. *Thayer*, 3 Met. 312. *Lincoln* v. *Taunton Copper Co.* 13 Allen, 276.

By the St. of 1878, the Legislature has enacted that the fees of auditors in the Superior Court and in this court shall not be taxed in the bill of costs of either party, but shall be paid by the county, like the fees of jurors; and the question presented in the first of the cases now before us is whether this rule is applicable where the auditor had been appointed and had returned his report, but judgment had not been entered, when the statute took effect. The second case differs from the first only in the fact that the auditor, although appointed before the statute took effect, did not return his report till afterwards. The cases have been submitted upon briefs for the plaintiff, being the prevailing party, in each case, and for the city of Boston, which is not only the defendant in one of the cases, but is also interested in the question in both cases, by reason of its obligation to pay all county charges. Gen. Sts. c. 17, § 6.

As a general rule, a statute regulating costs, like any enactment dealing with procedure only, applies, unless the contrary is expressed, to all actions, whether commenced before or after it takes effect. *Wright* v. *Hale*, 6 H. & N. 227. *Kimbray* v. *Draper*, L. R. 3 Q. B. 160. In accordance with this rule, it is settled in England, that a statute making executors liable to costs is applicable to an action brought by an executor before its passage. *Freeman* v. *Moyes*, 1 A. & E. 338; *S. C.* 3 Nev. & Man. 883. *Pickup* v. *Wharton*, 4 Tyrwh. 224; *S. C.* 2 Cr. & M. 401. *Grant* v. *Kemp*, 2 Cr. & M. 636. So it has been held, that where a statute authorizes the judge, by his certificate, to deprive the plaintiff of costs in an action of tort in which he recovers a verdict of trifling amount, such a certificate may be made after the statute takes effect, in an action brought and tried

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before its passage; and cannot be made after the repeal of the statute, in an action brought and tried while the statute was in force. *Wright* v. *Hale*, above cited. *Morgan* v. *Thorne*, 7 M. & W. 400. See also *Butcher* v. *Henderson*, L. R. 3 Q. B. 335.

In those cases, pending at the time of a general revision of the statutes, in which this court has ordered costs to be taxed according to previous statutes in force when the facts occurred upon which by those statutes the right to costs depended, it has been under an express provision of the revised code that the repeal of the former statutes should not affect any suit or proceeding had or commenced in a civil cause. Rev. Sts. *c.* 146, § 5. Gen. Sts. *c.* 181, § 4. *Gay* v. *Richardson*, 18 Pick. 417. *Sawyer* v. *Bancroft*, 21 Pick. 210. *Brigham* v. *Dole*, 2 Allen, 49.

In *Brigham* v. *Dole*, the court said, "Costs are a mere incident of the judgment. They are not to be taxed, excepting upon a special order in reference to the terms upon which an amendment is allowed, or the like, until final judgment is rendered; and then the taxation must be in conformity to the rules and directions of the law which at the time is in force." 2 Allen, 51. So in *Moore* v. *Watson*, L. R. 2 C. P. 314, it was said by Mr. Justice Willes, and affirmed by the judgment of the court, "The costs of a compulsory reference are costs of the cause; they are taxed upon the judgment, and can only be recovered on it."

In each of the present cases, final judgment not having been rendered, nor the compensation of the auditor awarded by the court, before the St. of 1878 took effect, that statute prohibits it to be now taxed in the bill of costs of either party, and requires it to be paid by the county. The clerk's taxation of costs must therefore be modified by striking out the auditor's fee; and an order should be entered, determining the compensation of the auditor, and directing that it be paid by the county, and a copy of that order transmitted by the clerk to the treasurer.

Ordered accordingly.

L. M. Child, for Fessenden.

N. B. Bryant, for Safford.

H. W. Putnam, for the city of Boston.

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LUCY M. WOOD *vs.* JOHN MANN & others.

Bristol. Oct. 25, 1877. — Sept. 3, 1878. LORD & SOULE, JJ., absent.

It is no defence to an action on a bond given to dissolve an attachment, that the principal defendant, while the original action was pending, was, in a trustee process, adjudged trustee of the plaintiff, it appearing that the defendant paid nothing in consequence thereof, and that the plaintiff had recovered judgment against the defendant without regard to the amount for which the latter had been adjudged trustee.

The issuing of an execution for costs only, upon a judgment for damages and costs, does not vacate the judgment; and, in an action on a bond given to dissolve an attachment made in the original action, that judgment cannot be impeached collaterally by the sureties on the bond.

The payment, by the sureties on a bond given to dissolve an attachment, of an execution for costs only, issued upon a judgment recovered against the principal defendant, for which a receipt, but no release under seal is given, operates as a payment *pro tanto* of the judgment, and does not release the sureties from liability to pay the remainder of the judgment.

CONTRACT upon a bond to dissolve an attachment, signed by the first named defendant as principal and the others as sureties. The principal was defaulted, and the sureties alone defended. The case was submitted to the Superior Court upon an agreed statement of facts, by which, if the plaintiff was entitled to recover, judgment was to be entered for her for the amount recovered in the original action; otherwise, judgment for the defendants. The Superior Court ordered judgment for the plaintiff in the sum of $93.23; and the defendants appealed to this court. The facts appear in the opinion.

J. M. Wood & M. Reed, for one of the sureties.

J. F. Jackson, for the other surety.

H. K. Braley, for the plaintiff.

AMES, J. It appears from the agreement upon which this case is submitted, that the plaintiff sued out a writ against the defendant Mann, upon which his property was attached, and that the other defendants joined with Mann in giving a bond in the common form to procure a dissolution of the attachment. After a trial by jury and a verdict against Mann for the sum of $89.83, but before judgment upon that verdict, a suit was brought against this plaintiff by one of her creditors, in which Mann was summoned as her trustee. In this latter suit the present plaintiff

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was defaulted, judgment rendered against her in the sum of $84.43 damages, and $9.30 costs, and Mann was duly charged as her trustee, upon default. Upon this judgment execution was duly issued, and, after demand made upon Mann as such trustee, was returned unsatisfied. If Mann, in this state of the case, had paid this execution in the suit in which he was charged as trustee, and had caused the fact of such payment to be duly entered of record in the suit of this plaintiff against him, according to the provisions of the Gen. Sts. *c.* 142, §§ 18–20, the plaintiff would have been entitled to judgment against him for her costs, and such part of her damages only as remained unpaid. But not having made such payment, the fact that Mann was summoned and defaulted as trustee furnishes him and his sureties no defence in the present suit. The court had jurisdiction of the case, and power to render judgment; whether judgment should be rendered in the original suit against him was a question for that court to decide; but the judgment, when rendered, cannot be impeached collaterally in the present case. *Cook* v. *Darling*, 18 Pick. 393. *Webster* v. *Lowell*, 2 Allen, 123. *Boston & Worcester Railroad* v. *Sparhawk*, 1 Allen, 448.

The plaintiff then had recovered a valid and legal judgment against Mann, the time required by the terms of the bond in suit had expired, and no payment had been made. The defendants therefore had committed a breach of their bond, and an action could well have been maintained against them therefor. But instead of calling upon them in that mode, and instead of taking out an execution for her damages and costs according to the usual and regular course of proceeding, the plaintiff saw fit to take an execution for her costs only. However irregular and unauthorized this proceeding may have been, we do not see that it could have the effect to vacate or annul the judgment which she had recovered, or to impair its validity. Whether having taken out an execution for a part of that judgment she could afterwards take out another execution for the remainder, or whether an execution for part only of the judgment debt, the remainder being unpaid, could lawfully be enforced, are questions which we are not called upon at present to consider.

Upon the refusal of these defendants to pay the costs for which execution had issued, she brought an action against them upon

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the bond now in suit. This action was not prosecuted to final judgment, but was settled by the parties without being entered in court, by the payment by these defendants of the amount of the execution which the plaintiff had taken out for her costs. If that action had been prosecuted to final judgment, and the plaintiff had claimed and taken judgment for those costs only, without including her damages as originally ascertained by her verdict, it might well be that the plaintiff would be debarred from any further claim. There could not be two judgments founded upon one single and indivisible breach of the bond. But as the suit was not prosecuted to final judgment, and the matter was adjusted by the parties out of court, the defendants can only say that they have paid part of what they were liable to pay. No release under seal was given, and the receipt which they took as their voucher does not purport to be for the entire judgment, but in settlement for the amount of an execution for costs only. This execution the defendants have paid with the knowledge that it was not in full for the entire amount of the original judgment. The satisfaction of an execution is not necessarily a satisfaction of the judgment. The creditor may show that satisfaction was acknowledged by mistake. *Canfield* v. *Miller*, 13 Gray, 274.

We see no ground therefore upon which it can be claimed that the condition of the bond has been fulfilled by the defendants, or released or waived by the plaintiff; and we therefore

Affirm the judgment of the Superior Court.

SECOND RELIGIOUS SOCIETY OF BOXFORD *vs.* DANIEL F. HARRIMAN.

Essex. Nov. 8, 1877. — Sept. 5, 1878. MORTON & SOULE, JJ., absent.

A case stated, whereby it is agreed that judgment shall be for the plaintiff, if the action can be maintained in any form, "either at law or in equity," waives all questions of form and process.

A testator by his will gave $1500 to a parish "to build and support a public school for the education of children as the law now directs, to be located as near a certain meeting-house as land could be purchased for a reasonable price. The parish, in 1864, voted to accept the gift, chose a committee of its members, of which A.

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was chairman, to receive it, and subsequently, without leave of court, voted, in 1865, to relinquish the trust fund to that school district within it nearest the meeting-house. The district, having accepted the fund, chose a committee of its inhabitants, of which A. was also chairman, to administer it. A. continued to hold the fund, his associates disclaiming any interest in it, as a trust fund. *Held*, in an action brought in 1875, that the gift was a public charity; that the parish might recover possession of such trust fund; and that the statute of limitations had not begun to run in A.'s favor.

CONTRACT for money had and received. Writ dated April 29, 1875. The answer set up the statute of limitations. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts in substance as follows:

The will of Ephraim Foster of Boxford, dated January 3, 1835, contained, besides other provisions, the following:

"And further at the decease of my said wife Orissa, all of the above property left in trust for her benefit shall be disposed of as follows, that is, fifteen hundred dollars of the same shall be given to the West Parish in Boxford to build and support a public school for the education of children as the law now directs. Said school-house to be located as near the meeting-house where the Rev. Dr. Eaton now preaches, as a piece of land for that purpose can be purchased at a reasonable price." The testator died on February 5, 1835, and the will was admitted to probate on March 10, 1835. His widow died in May, 1864.

The records of the Second Parish in Boxford, which was the West Parish, contain no mention of this legacy, until the warrant dated May 27, 1864, for a legal meeting of the voters of the parish, on June 6, 1864, which contained the following article:

"5th. To see if the parish will vote to accept the legacy given to the West Parish in Boxford, by the will of Ephraim Foster, late of Boxford, and appropriate the same for the purposes for which it was given, and, if so, to choose a committee and authorize them to receive said legacy, and cause the same to be expended, agreeably to the conditions specified in said will." At this meeting duly held on June 6, it was voted: "To accept the legacy given the West Parish in Boxford, by the late Ephraim Foster, and to choose a committee to receive and expend the same as the parish shall instruct;" and Daniel F. Harriman, John F. Kimball, and Joshua T. Day, were chosen a committee. Of this

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committee, Harriman is the defendant. Kimball has not resided in the parish for five years and has no interest in the society, and Day is dead.

The next mention of said legacy in the parish records is in the warrant, dated May 11, 1865, calling a meeting of the voters of the parish on May 19, and containing the following articles: "2d. To see if the parish will vote to appropriate the legacy bequeathed the West Parish in Boxford, by the late Ephraim Foster, for educational purposes, in what has been known as the Seventh School District in Boxford, or take any order on the subject when assembled. 3d. To see if the parish will allow the income of the legacy bequeathed the West Parish in Boxford, by the late Ephraim Foster, for educational purposes the past year, to be expended in the above named school district the present school year. 4th. To see what further instructions the parish will give their committee in relation to the bequest of the late Ephraim Foster to the West Parish in Boxford for educational purposes."

At this meeting held on May 19, 1865, it was voted "To instruct the committee to purchase the land and house according to the letter of the will." "That the parish relinquish the legacy bequeathed by the late Ephraim Foster to the West Parish in Boxford for educational purposes to what has been known as the Seventh School District in Boxford." "That the parish relinquish, to what has been known as the Seventh School District in Boxford, the interest which has accrued upon the fund bequeathed by the late Ephraim Foster to the West Parish in Boxford for educational purposes."

The Seventh School District was the nearest to the meeting-house named in the will.

A warrant dated June 24, 1865, called a meeting of the voters of the parish on July 1, 1865, to act upon, among others, the following articles: "2d. To see what action, if any, is necessary to authorize by proper limitations the Seventh School District in Boxford (said district being a part of said parish) to use and expend said legacy in accordance with the views of said Foster as expressed in his will, and to authorize said school district to use and expend said legacy. 3d. To reconsider, if deemed necessary for the purposes expressed in the above arti-

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cle, any votes passed at a meeting of said parish held on said 19th day of May, 1865. 4th. To give definite and specific instructions to the committee having in charge said legacy as to what they shall do in the matter of said legacy, and to authorize said committee to take such action and do such things as may be necessary to carry out the objects set forth in the second article above. By request of D. F. Harriman and others."

At this meeting duly held on July 1, 1865, the following votes were passed:

"Voted, That whereas the parish deeming that the views of Ephraim Foster, in reference to the legacy bequeathed by him to the parish for educational purposes, will be best carried out by transferring the expending and use of said legacy to what has been known as the Seventh School District in Boxford, said school district being a part of said parish, therefore, it is voted, that the expending of said legacy, with the interest accrued thereon, be given to said Seventh School District, with the right upon the part of said district to use said legacy in repairing, enlarging or rebuilding their school-house, and for the instruction of the scholars within the limits of said district at such place as shall best carry out the intentions of said Foster as expressed in his will."

"Voted, That the votes of the parish passed at the meeting held on the 19th day of May, 1865, whereby said committee having in charge said legacy were directed to purchase a lot of land and house, is hereby reconsidered and annulled."

"Voted, That the committee of the parish having in charge said legacy be instructed to deliver the money received by them under said legacy, with the interest accrued thereon, to such committee as the said Seventh School District shall appoint to receive the same."

Nothing further was done in reference to the fund by the parish, nor was the committee ever discharged, nor did they ever make a report to the parish, after the date of the last mentioned meeting.

At a legal meeting of the voters of the parish held in pursuance of a warrant, "to see what action the parish will take in regard to fund left by the late Ephraim Foster for the support of a school," held on April 6, 1875, it was

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"Voted, That a committee of three be chosen by the parish to take all necessary steps for the legal procurement and acceptance of the fund bequeathed the parish by Ephraim Foster for educational purposes now in the hands of Daniel F. Harriman;" and M. S. Jenkins, Isaac W. Archer, Nathaniel Gage, were chosen as the committee. On April 29, 1875, this committee by its chairman demanded, in behalf of the parish, the fund of the defendant, and the defendant declined to pay it, except upon a decree of the court as to whom it belonged.

At a town meeting called and held in Boxford, on March 6, 1865, "to see if the town will vote to unite the fifth, sixth and seventh school districts, or to unite either the fifth or sixth school district with the seventh, or take any action on the subject; by request of Daniel F. Harriman and others," it was voted "to unite the fifth and seventh school districts."

At a town meeting called and held on March 22, 1865, "to see if the town will make null and void the vote whereby the fifth and seventh school districts were united at the last annual town meeting," it was voted "to make null and void the vote, whereby the fifth and seventh school districts were united at the last annual town meeting."

The fifth, sixth and seventh school districts were contiguous, and the only districts in the West Parish.

The records of the Seventh School District in Boxford show that a warrant dated July 1, 1865, for a meeting of the voters in the district, contained the following articles: "2d. To see if the said district will vote to accept the legacy devised to the West Parish in Boxford for educational purposes by the late Ephraim Foster, and transferred by the said parish to what has been known as the Seventh School District in said Boxford. 3d. To choose a committee to receive said money and appropriate and expend it under said will, according to a vote of said parish, or take any order that they may think expedient when assembled."

At this meeting, duly held on July 8, 1865, the district voted, "To accept the said legacy in the warrant." "To choose a committee of three to receive said money and expend it according to the warrant;" and Daniel F. Harriman, Isaac W. Andrew and Moses Kimball were chosen by ballot. "That the committee be instructed to pay the outstanding bills accrued pertaining

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to said legacy, and the residue, if any, to extending the winter term of school the current year."

At a meeting of the inhabitants of the Seventh School District, held on March 5, 1866, it was voted to accept the report of the committee, which stated how the fund was invested, how much of the income was spent and the balance on hand.

Nothing further appears upon the records of the school district in relation to the committee or to the fund. Since the passage of the St. of 1869, *c.* 110, abolishing "the school district system in this Commonwealth," the Seventh School District has not been reëstablished, nor has the school district system been reëstablished since that time in Boxford.

The defendant Harriman has had the custody of the fund since June 6, 1864. Of the committee appointed by the Seventh School District to receive the fund from the parish, Andrew and Kimball do not now claim to be members of the committee of the district, and claim no interest in or authority over the fund. The defendant is one of the heirs at law of Ephraim Foster.

Subsequently to March 22, 1865, the fifth and sixth school districts, before any action was taken by the committee chosen by the Seventh School District in reference to the fund, at meetings called for that purpose, voted to relinquish any claim such districts might have in the fund to the Seventh School District.

No question is made as to the legality of any of the foregoing meetings of the parish or the town of Boxford or of the Seventh School District, provided at the time the meetings were called the district had the power or right to call such meetings.

At the meeting of the Seventh School District, held on the 5th day of March, 1866, there were several members of said parish present when said report was read.

Since July 8, 1865, the defendant has always claimed to hold the fund as chairman of the committee of the Seventh School District appointed at the date.

The defendant paid $361.36 out of the fund for the support of schools in the Seventh School District while claiming to hold the said fund as chairman of its committee, and such sum was paid with the knowledge of some of the members of the parish.

If the statute of limitations was not a bar to the recovery by the plaintiff of the fund from the defendant, and if the plaintiff

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could maintain an action therefor in any form of action, either at law or in equity, then judgment was to be entered for the plaintiff for the amount of the legacy and interest, after deducting the defendant's disbursements, the amount for which judgment was to be entered to be determined by an assessor; otherwise, judgment was to be entered for the defendant.

J. C. Perkins & W. S. Knox, for the plaintiff.

E. T. Burley, (*E. J. Sherman* with him,) for the defendant.

LORD, J. By the agreed facts, we understand that the parties wish to waive all matters of form and of process, and to desire the opinion of the court upon the question, whether the plaintiff, at the day of the date of the writ, was entitled to the funds given to it by the will of the late Ephraim Foster. The question is not one of pleading, but is to be decided irrespective of the mode of proceeding; and if, in any process with proper parties in law or in equity, the plaintiff is entitled to hold and administer the trust created by the will, judgment is to be entered for the plaintiff, with this single qualification, that if, as against the defendant, the process is barred by the statute of limitations, judgment is to be entered for the defendant.

Upon the first question, we are of opinion that the plaintiff is entitled to the fund. The gift was a gift for charitable uses. In all the discussions upon the question, What is a charity? there has never been a question that education is a proper subject of a gift for charitable uses. The St. of 43 Eliz. *c.* 4, recognizes no charitable uses which are not now upheld, both in England and in this Commonwealth. In that statute are enumerated, in words, "schools of learning," "free schools," "scholars in universities," "education and preferment of orphans."

The beneficiaries are indefinite. The gift is not for the education of any particular person or persons. The parenthetical expression "as the law directs" we can construe only as designed to embrace all persons for whom the law then designed schools to be supported. If the gift had been for the support of poor persons, as the law now directs, the natural construction would be for such poor persons as by law towns are required to furnish support for. There can be no doubt, therefore, that the beneficiaries of the bequest are sufficiently indefinite to be the subject of a bequest for charitable uses.

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No question is made by the defendant that the plaintiff is not competent to take and hold in trust for charitable uses. His claim is, that the plaintiff has fully executed the trust; if not exactly, at least *cy pres*.

This leads to inquiry into the legal effect of the action of the parish. It is quite probable that the purpose and intention of the plaintiff was to limit the benefits of the trust to such persons as should be resident within the Seventh School District. To do this, it conveyed the trust fund to the district, thereby surrendering all control of it, and permitting it to be administered by such district. If it were an absolute disposition of the fund, it would be a violation of duty. If, however, it was understood, as it seems to have been understood by all parties, as a mere substitution of the district for the parish, in order that the district might as trustee administer the trust, it was not competent for it to do so without the consent of a court of chancery, which it did not have. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280.

The plaintiff accepted the trust. It has not administered it. Upon proper proceedings had, it would be compelled to account for the funds, and either to hold and administer the trust, or to pay the fund over to a new trustee, duly appointed.

The question submitted is, whether the plaintiff has authority to do that voluntarily, which it may by law be compelled to do; or rather, whether it may recover the property from one to whom it has wrongfully disposed of such property, instead of furnishing the necessary sum from its own resources. This must depend upon the circumstances of the case. We have no doubt that a trustee may so dispose of trust funds as that he cannot reclaim them, and we are equally clear that, under some circumstances, he may reclaim the fund, even though he has made what he intended should be an absolute and final disposition of it. It becomes necessary, therefore, to see what the facts are in the particular case. The defendant was a member of the plaintiff society; he was also an inhabitant of the Seventh School District, as well as an inhabitant of the town. When the plaintiff voted to accept the legacy, the defendant was chosen upon the committee to receive it, of which committee he seems to have been chairman; when the plaintiff proposed to transfer the

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fund to the Seventh School District, and the district proposed to accept it, the defendant was chosen upon the committee of the district to receive it; of this committee he also seems to have been chairman, and at present is the only member of the committee, his associates disclaiming any authority to act or power over the fund. As chairman of the plaintiff's committee, the defendant received the fund and the nominal transfer of the fund to the district, involving no change in the actual custody of the fund. The defendant has had, since its receipt from the estate of Foster, the actual keeping and control of the fund, which he has kept specifically as the fund, and now holds. He has never contended that he has a personal property in the fund; but has always held it, claiming to hold it only as subject to the trust. This fund we think the plaintiff is entitled to hold.

The various changes and attempts at change of the district, and the final abolition of the system of districts, and the merger of all district property in the town, we have not thought it necessary to discuss; for the reason that, as we understand the agreement of facts, no question is made as to the parties to the suit, but only the question, whether, in any proceeding at law or in equity, the plaintiff has a right to repossess itself of the fund.

Nor can we regard the statute of limitations as a bar to the claim against the defendant. He took the fund as a trust fund. The general rule of law is, that one holding a trust fund cannot avail himself of the statute of limitations to bar the claim of any person to such fund. He must show that in some open and notorious manner he has disclosed to the party in interest his purpose to hold the fund adversely to the trust, for a period of time long enough to bar the claim, and under circumstances in which he was subject to a suit for it. In this case there is no such evidence, nor any evidence that the defendant ever claimed the fund as his, but has always held it subject to the claim of the rightful owner. It is true that the report of the case finds that the defendant, ever since his appointment on July 8, 1865, "has claimed to hold said fund as chairman of the committee of the said Seventh School District;" but it is apparent that he was claiming it simply as a trust fund; for when it was demanded of him on April 29, 1875, he "declined to pay it, except upon a decree of the court, as to whom it belonged." It

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is quite clear from this that, at least up to that date, he had made no claim to it except as a trust fund to be administered according to law; and we think that, at all events, the statute of limitations had not then begun to run.

Our opinion therefore is, that, by some suitable proceedings in law or in equity, the plaintiff is entitled to the fund, and that the statute of limitations is not a bar in favor of the defendant. And consequently, by agreement of the parties, judgment is to be entered for the plaintiff for such sum as may be agreed upon, or as shall be determined by an assessor.

Judgment for the plaintiff.

JOHN MCCAFFREY *vs.* WILLIAM C. CARTER.

Essex. Nov. 9, 1877. — Sept. 5, 1878. MORTON & SOULE, JJ., absent.

After judgment for the conversion of certain chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, although the plaintiff was prevented from including them in the former action by the fraudulent acts of the defendant.

TORT for the conversion of 40 machinist's tools. Writ dated October 17, 1876. Answer, that the tools were part of a large number, converted at one time by one act, for which conversion the plaintiff had recovered judgment against the defendant, which had been paid.

At the trial in the Superior Court, before *Gardner*, J., it appeared that the plaintiff had occupied for two years a building, belonging to the defendant, as a machine shop; that about April 20, 1874, the defendant took possession of the premises under mortgages which covered most of the personal property therein, and excluded the plaintiff and his workmen therefrom, and that the defendant had since retained possession of the premises and the personal property. The plaintiff testified that during the year 1874, he and his family were ill, and he did very little about the matter; that afterwards a reference was attempted, which failed; that, while this was pending, he went to the shop about every week to see the defendant about it, but the latter

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avoided him; that this lasted from January to May, 1875; that after that he was not at the shop more than twice until about November 20; that in August, 1875, he brought an action against the defendant for the conversion, in which a nonsuit was entered by agreement; that before this was done, he had thought of other articles not included, and decided to give up that action and bring a new one; that about November 20, he again went to the shop and demanded of the defendant to see and take the goods, but the defendant refused to comply with the demand, and ordered him from the premises. It did not appear that he explained to the defendant what goods in particular he referred to, or that the defendant then knew that the action was to be abandoned.

On December 2, 1875, the plaintiff brought a new action, including in his declaration, as he testified, all he could then remember or ascertain about. This action was tried at March term 1876, and judgment rendered against the defendant for $634, which he paid. The plaintiff further testified that afterwards, at three different times, he demanded other articles of the defendant, and the first two times the defendant went through the shop with him and gave up a part, but, observing him taking notes of other articles, turned him out of the shop; that the last demand was made on September 18, 1876.

Upon this evidence, the defendant requested the judge to rule that the former judgment was a bar to this action; and that there was no evidence of any wrongful concealment, of the articles sued for in this action, before the former suit. But the judge declined so to rule, and instructed the jury that the judgment recovered in the first action would be a bar to this action, unless the plaintiff was prevented from including these articles in the former action by the wilful, intentional acts of the defendant in secreting the goods, or wilfully preventing the plaintiff from seeing them, with intent to prevent him from knowing what they were; that if, in the former action, the plaintiff accidentally omitted the articles sued for in this action, or if he failed to remember them, or if, by any act of the plaintiff, he neglected to enumerate those articles now sued for, the former judgment would be a bar to this action.

The jury returned a verdict for the plaintiff for $109.05; and the defendant alleged exceptions.

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C. U. Bell, for the defendant.

E. T. Burley, for the plaintiff.

LORD, J. The general principle, that there is but one cause of action by reason of the conversion of various chattels at the same time, is admitted by the plaintiff. His claim is that, in a former action for the same conversion, the defendant fraudulently concealed the fact that the chattels, for the value of which this suit was brought, had been concealed by the defendant, who had fraudulently prevented the plaintiff from ascertaining the fact by refusing to allow him to examine the articles taken. It is not necessary to consider whether any refusal by the defendant to allow access to his building by the plaintiff for the purpose of ascertaining whether any and what property belonging to him was there can in law be fraudulent. We assume that the defendant did fraudulently conceal the fact that the articles which are the subject of the present suit were a part of the chattels originally taken. Assuming this, What is the effect? The cause of action (and the plaintiff had but one cause of action) was not concealed. The plaintiff knew its existence, brought his action upon it, recovered judgment, and that judgment was satisfied. The fraud was in preventing the plaintiff from proving in that case the full extent of his damage. With the right of the plaintiff to require full disclosure of all facts necessary to his case, upon interrogatories filed, the power to compel him to produce all documents, and to examine him as a witness, and the authority of the court to allow amendments, it is difficult to understand how the defendant could fraudulently conceal from the plaintiff the extent of the damages sustained, even if it is any part of the defendant's duty to afford such facilities. We should certainly be inclined to regard the failure of the plaintiff to make the proper proofs as evidence rather of his own laches, than of a fraud of the defendant, at least until he had exhausted the means within his power to ascertain the extent of his damages. But assuming the fraud to the extent claimed by the plaintiff, the former judgment is, while it remains unreversed, upon principle and authority, a bar to this suit. *Folsom* v. *Clemence*, 119 Mass. 473, and cases cited.

Exceptions sustained.

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NATIONAL PEMBERTON BANK *vs.* EDWARD F. PORTER.

Essex. November 8, 1877; May 2. — September 28, 1878.

A national bank which purchases a promissory note from an indorsee may maintain an action thereon in its own name against a prior party thereto, without regard to the question whether the purchase was one which it was authorized by law to make.

CONTRACT on a promissory note dated January 11, 1876, for $10,000, signed by James O. Ives & Co., payable in four months from date to the order of the defendant, and indorsed by him, "waiving demand and notice." Writ dated June 28, 1876.

At the trial in the Superior Court, before *Gardner*, J., there was evidence that the plaintiff, a national bank established at Lawrence under the laws of the United States, purchased the note in Boston from one Benyon, the president of the Exchange Bank in Boston, a few days after its date, paying its face value, less interest, therefor.

The defendant asked the judge to rule that the plaintiff, being a national bank, had no power or authority, under the U. S. St. of June 3, 1864, §§ 6, 8, 30, 39, and the U. S. Rev. Sts. §§ 885, 3407, 5133–6, 5197, to purchase the note in suit, and therefore had no title to the note. The judge declined so to rule; but ruled that the action could be maintained, and ordered a verdict for the plaintiff. The jury returned a verdict accordingly; and the defendant alleged exceptions.

The case was argued at the bar in November 1877, and additional briefs were submitted to the court in May 1878.

L. W. Howes, for the defendant.

D. Saunders & C. G. Saunders, for the plaintiff.

LORD, J. The plaintiff bank brings this action against the defendant as the indorser of a promissory note. The note is in the possession of the bank as the holder of it. The defence is, that the plaintiff purchased the note of one Benyon; that the plaintiff is a national bank; that a national bank has no authority to buy a promissory note; that the purchase of it was therefore *ultra vires;* and the conclusion of law which the defendant claims to be the legal result of these facts is that no action can be maintained upon the note by the bank. It is important that

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we do not confuse our ideas by the use of words, and it is therefore necessary to determine what is the exact contract in suit. The contract is in writing. In form it is a negotiable promissory note. Its legal effect is an absolute agreement on the part of the maker to pay to the payee, or to any indorsee of the instrument, a sum certain on a day certain; while it is also a conditional promise, on the part of the indorser to the indorsee, to pay the same sum upon the default of the maker and due notice to himself. In this case, it is conceded that such condition has been performed or waived, so that the promise of the indorser has become absolute. On these points there is no controversy. The contract therefore, in itself, is one which may lawfully exist between these parties. It is the precise contract which exists between the parties to every note discounted by a bank in the ordinary course of banking business which national banks are authorized to transact. No claim is made that the promise was not made upon a full consideration; or that any fraud was practised upon any party to the contract; or that it has been paid; or that any equities exist between the maker or any indorser and the holder; or that, under the form of a lawful contract, was concealed any usurious device; so that the contract in itself has no taint of usury, of fraud or of illegality.

What is the contract which it is said is *ultra vires?* Not the contract in suit, but another contract, to wit, the contract with Benyon, who is not in any sense a party to the contract in suit; nor is it necessary to the maintenance of this action to connect him with it. The contract with Benyon, assuming such a contract to have been made, and, for the purposes of this discussion, assuming it to have been *ultra vires*, is not executory; this suit is not to enforce it; but it has been fully and completely executed. It is true that the contract with Benyon was one of which the contract in suit was the subject matter. The question then arises, Can a party to a contract in itself lawful, and into which all the parties to it had authority to enter, be made null or be incapable of enforcement, because the plaintiff has entered into and fully performed, with another and totally distinct party, a contract in reference to it which was unauthorized, even though by such contract he becomes a party to the contract in suit?

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There is nothing of mystery or of sanctity in the use of the words of a dead language, *ultra vires;* and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation. We do not see in what respect there is any difference, in legal effect, between the obtaining of a note by an individual and by a corporation, if it be obtained wrongfully.

Applying the rule to a natural person, Would it be a defence, by a maker of an unpaid promissory note, to prove that the plaintiff obtained the note in a fraudulent bargain? or that the plaintiff took it from one not a party to it, in payment for intoxicating liquors illegally sold? or that he took it from a third person in discharge of a gaming debt, or in any transaction in which the person had no right to be engaged? These are all cases in which the party would acquire his title by transactions beyond his authority. These are questions which, under the law of this Commonwealth, it is not necessary to decide or consider.

In this Commonwealth, it is not necessary that the plaintiff in a suit upon a promissory note should have the legal title or beneficial interest in the note, nor indeed that he should have any title or any interest in it. Adjudications of this point, commencing with *Little* v. *Obrien*, 9 Mass. 423, are scattered through more than a hundred succeeding volumes of reports, embracing a period of about seventy years, have been unquestioned during all that time, and are daily recognized as the law of the Commonwealth. In *Little* v. *Obrien*, this very question of *ultra vires* was raised by the defendant, and both the questions, whether a contract with a corporation was *ultra vires*, and whether a plaintiff having no title could sue, were raised and elaborately argued for the defendant, by Mr. Story, who afterwards and for so long a time adorned the bench of the Supreme Court of the United States. The cause was argued before that eminent magistrate, Chief Justice Parsons, and his distinguished associates, Justices Sewall and Parker. In announcing the decision, the court uses this suggestive language: "Whether, for this misbehavior of the corporation, the government might not

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seize their franchises, upon due process, is a question not now before us." In *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, there was a claim for goods sold and delivered to the defendant, and among other defences was the defence that the sale of the goods was *ultra vires;* that, by its charter, the plaintiff corporation was prohibited from engaging in such trade; and, in addition, it was also contended that the corporation never legally organized, and therefore had no existence as such. As to the last objection, it was said that, even if it existed, it would not be open to a member of the corporation, which had been in operation *de facto*, doing business for a number of years. In relation to the claim that the sale of goods was *ultra vires*, Chief Justice Parker, after expressing a conviction that the sale as made was not a violation of the spirit and intention of the act of incorporation, adds, "but the Legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused." Without deeming it necessary to decide that these two cases are authority for saying that it is not open to an individual to raise the question whether a collateral act of a corporation is within its corporate power, it will be found, when that question is directly presented, that there are many decisions of courts which tend to that result.

In this Commonwealth, the only questions which are involved are, First, Has the plaintiff legal capacity to sue? Second, Is the plaintiff the holder of the negotiable note declared on? On neither of these questions can there in this case be any doubt. Even if it were necessary to show that the contract was one which the plaintiff is competent to hold, then, as we have already seen, the contract is such a one; and the fact that the holder became possessed of it in the manner claimed is a wholly immaterial fact. To illustrate further the fact that it is not necessary that the plaintiff bank be the owner of the note in order that an action may be maintained upon it, suppose that this note had been discounted in the ordinary course of business, and the bank had filled the blank indorsement, as at any time it had authority to do, and as before judgment is entered it is proper to do, by writing over the indorser's name the words, "Pay the within to the National Pemberton Bank," and, under its authority to negotiate the note, had transferred it, without

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indorsement, for its full value, to a third party. Such third party could maintain an action upon it in the name of the present plaintiff, although the present plaintiff has no interest in it. Suppose, for the sake of argument, that the plaintiff is not the *bonâ fide* holder of the note, within the meaning of that phrase when used in law in relation to the holder of a negotiable promissory note, what would be the result of such admission? Simply this, that any defence might be made to the note which could be made between any of the parties to it, as between one another; nothing more. But in this case there are no equities which could be pleaded to the notes in the hands of any party.

If the act of purchase was wholly unauthorized, the utmost legal effect is that the transaction was wholly void, and Benyon is still the owner of the note. What then? The most that could be claimed is, that the bank receives the payment of it in trust for the real holder; precisely as it would, if it had recovered the amount, as in the case above supposed, after it had sold the note to a third person. With the equities between such parties, this defendant has no concern.

It is said that, if this be the correct view of the law, the statute in relation to usurious contracts would be nullified; that a bank could say to a customer, "We cannot discount this note, but we will buy it," and thereupon does buy it, at a rate at which they were not authorized to discount it, and thus avoid the penalty of usury. Such result by no means follows. If, in this case, the intervention of Benyon were a mere device for the purpose of obtaining, as between the original parties to the note, a loan of money at a usurious rate of interest, the question presented would be a very different one. There is here no such claim or pretence. The amount given for the note was the face of the note, less the legal interest from the time of the alleged purchase to the maturity of the note. There are, however, other appropriate considerations in such case. The suit then must be between the parties to a wrongful contract still executory; and whether, in such case, the plaintiff would not be estopped to deny that such contract arose in any other mode than by discount, we need not discuss. It is quite sufficient to deal with questions as they arise, without speculating upon what would be the legal effect of a totally different condition of facts.

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Two cases have arisen in Minnesota; one in 1876, *Farmers & Mechanics' Bank* (a state bank) v. *Baldwin*, the other in 1877, *First National Bank of Rochester* (which was a national bank) v. *Pierson*, in each of which it was decided that the plaintiff could not recover upon a promissory note purchased by it, because such purchase was *ultra vires*, and consequently conferred no title to the note. If we accept the result of these decisions, there is nothing in either of them in conflict with these views. By the law of Minnesota, no action can be maintained upon a chose in action, except by the real owner; and, as will be seen by reference to those decisions respectively, the question which the court passed upon was whether the plaintiff acquired a title to the note in suit. In *Farmers & Mechanics' Bank* v. *Baldwin*, the discussion of the subject by the court is thus opened: "Inasmuch as the ownership of the note by plaintiff is put in issue by the pleadings, the question necessarily arises whether the plaintiff had the corporate power to make the purchase in the manner it did, and whether, by such alleged purchase, it acquired any title which it could enforce against either the maker, or Baldwin, the indorser." And the concluding paragraph of the opinion commences thus: "Having no corporate capacity to make the contract of purchase, the plaintiff never acquired any title to the note in suit." 23 Minn. 198. In *First National Bank of Rochester* v. *Pierson*, the ruling of the court below, which came before the Supreme Court for revision, as quoted by the judge who delivered the opinion, was "that the plaintiff, a national bank corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did not in law acquire, by the supposed purchase, any title to the note in question, and cannot recover upon it in this action." The judge then, having previously referred to the fact found by the court below, that the plaintiff purchased the note, proceeds: "Upon the fact as thus found, it will be seen that the only question presented is, whether a national bank, created," &c., "is authorized to deal or traffic in promissory notes, as a species of personal property, or to acquire any title to such paper by a purchase." 24 Minn. . It appears therefore that in those cases the only question raised was the question of title to the notes in the plaintiff; and that question, as we have seen, is in this Com-

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monwealth wholly immaterial; for we have no such statute as the statute of Minnesota, requiring a suit to be brought in the name of the real owner of a chose in action, and it is the established law that the holder of a negotiable promissory note may bring suit upon it, whether in law or in fact he be or be not the real owner of it.

In *Rohrer* v. *Turrill*, 4 Minn. 407, the defence to an action on a promissory note was that the plaintiff was not the owner of the note, but had disposed of it to a third person in fraud of creditors. The court say that the fact that the plaintiff had disposed of the note to a third person is a complete defence to the action, and add that it is no concern of the defendant whether that disposition was fraudulent or not; as he had not paid the note, but owed it, it was not a matter for him to inquire by what arrangement it went into the hands of a third party; the actual transfer was to him a perfect defence; and the court cannot avoid suggesting the incongruity of the claim of the defendant that the title of the third party was fraudulently obtained, which, if competent, would simply show that such transfer passed no title, and that the suit was properly brought in the name of the plaintiff, who would be the real owner in such case.

We are therefore of opinion that there was no error in the refusal of the presiding justice to rule as requested by the defendant's counsel. The ruling asked was, upon the facts of the case, a wholly immaterial one, upon which the court was not called upon to make any ruling. *Exceptions overruled.*

ATTLEBOROUGH NATIONAL BANK *vs.* HARRY A. ROGERS & others.

Suffolk. June 25. — Sept. 28, 1878. AMES & ENDICOTT, JJ., absent.

In an action for money had and received, to which the answer was a general denial, it appeared that the defendants, a firm of brokers, sent to the plaintiff, a national bank, certain promissory notes, ordered by its president and a director, for the amount of which its cashier returned a check to them; and the question was whether the plaintiff purchased the notes or had the option to buy them or not, as its board of directors should decide. The directors refused to purchase the

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notes. The defendants offered to prove that national banks bought commercial paper, which their presidents were authorized by usage to purchase, and requested the judge to rule that, even if the plaintiff had such option, the action of its cashier completed the sale. The judge rejected the evidence, refused so to rule, and, by consent of parties, before verdict, reported the case to this court, upon an agreement that if the plaintiff could not lawfully buy the notes and the evidence was rightly rejected and the rulings refused, a verdict should be entered for the plaintiff. *Held*, that the question whether a national bank had authority to purchase promissory notes did not arise in the case; and that the question as to the contract between the parties was for the jury.

CONTRACT for money had and received by the defendants to the plaintiff's use. Answer, a general denial.

At the trial in the Superior Court, before *Wilkinson*, J., at April term 1877, it appeared that the plaintiff was a national bank, organized in 1866, under the banking laws of the United States, and that it was in the habit of investing its available funds to a considerable extent in commercial paper. The defendants were brokers in Boston, engaged in selling commercial paper.

On September 27, 1875, the defendants wrote to the plaintiff that they had three notes of C. & M. Cox, describing them, which it could have at a rate named, if desired. The plaintiff had before that time purchased notes of C. & M. Cox of the defendants. On Wednesday, September 29, 1875, Evans, the president, and Whitney, a director of the plaintiff bank, came to the defendants' place of business to get some notes for the bank. They testified in substance that they informed the defendant Rogers that they wished to get for the bank good notes to the amount of about $20,000, and he thereupon produced and made a selection from a large number of notes, remarking that there was a lot of good notes, as they could see from the large number he had selected from; that out of this number they took twelve notes, amounting to between $26,000 and $27,000; that they knew nothing of the responsibility of the makers of any of the notes and relied wholly on Rogers's knowledge concerning it; that Whitney then said, "We shall want a few days to decide whether we will keep this paper," to which Rogers assented; and thereupon Evans said, "We shall want until Monday to submit it to the board of directors, as no one has authority to take it without the action of the board, and the board meets on Mon-

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day;" to which Rogers replied, "You can keep it until Monday, and return any or all of it, as you like."

Rogers testified in substance that Evans and Whitney came in on Wednesday, September 29, and asked him if they still had the Cox paper, and he told them he had two pieces of it, but that he had sold one; that Evans said, "We will take that;" that he went and brought out the bundle of notes in which were the two Cox notes in question, and took the Cox notes out and handed them to Evans, who took them and placed them one side, saying, "We will take these, any way, and now we want you to select us enough more to make up about $20,000 or $25,000;" that thereupon he selected from his bundle ten notes more, making up the amount to that named, stating to them that the notes were of the best quality, and showing them his sales book, referring to the banks and other parties who had bought notes of this description, and the rates; that he then said to them, "You can have a day or two if you desire, to decide whether you wish to purchase any of this paper or not," referring to the ten notes which he had thus selected; that Evans then said they would like to have until Monday, to which he assented; that no reference was made to their books as to the character of the Cox paper, and nothing was said about it, except to ask for it, and when it was produced to say, "We will take that any way;" and that nothing was said to him then, or on any other occasion, about referring the question of purchase to the board of directors.

Rogers gave the twelve notes thus selected to his clerk to make up the bill according to the rates expressed, and subsequently on the same day Whitney came in and took the notes and bill to the bank. On Thursday, September 30, the cashier of the bank wrote to the defendants a letter inclosing three of the twelve notes, other than the two Cox notes, and a check for the amount of the balance, which letter the defendants received the same day, about 7 o'clock, P. M. At 2 o'clock of Thursday, September 30, C. & M. Cox suspended payment, and their paper went to protest, and certain officers of the plaintiff bank heard of the failure on Friday or Saturday following.

On the Monday morning following, the president and cashier of the bank applied to the defendants to take back the Cox

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notes, which they declined to do, the officers of the bank contending that they had the right to return any or all of the notes taken on September 29 on or before Monday, and the defendants denying their right to return the Cox notes. Subsequently on that morning they asked the defendants if they would take back the rest of the notes, and the defendants told them they would.

In the afternoon of Monday, the board of directors of the bank, for the first time as a board, acted upon the nine notes retained out of the twelve taken, and refused to take them; and thereupon the cashier, under the instructions of the board, inclosed the notes, including the two Cox notes, in a letter to the defendants, informing them of the action of the directors, to which the defendants replied, returning the Cox notes. The plaintiff put in evidence, against the defendants' objection, a by-law of the bank, as follows: "There shall be a standing committee, to be known as the exchange committee, consisting of the president and two directors, appointed by the board, to continue to act until succeeded, who shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange not exceeding twelve hundred dollars, except upon their own personal responsibility, and who shall at each regular meeting of the board make a report of the bills and notes discounted and purchased by them since their last previous report."

The defendants offered to prove that for many years a very large portion of the business of national banks consisted in buying commercial paper, and was not confined to the discounting of such paper, and that, by a uniform and well established usage, the presidents of banks were authorized to and did buy commercial paper for the banks; but the judge refused to admit such testimony.

The defendants further contended, and asked the judge to rule, that if the agreement of September 29 was as testified to by Evans and Whitney, yet that the letter of the cashier of September 30, with the check accompanying it, made a completed sale, by which the bank was bound, and that it could not afterwards rescind such sale; but the judge declined so to rule.

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The judge being of opinion that, under the banking laws of the United States, a national bank had no right to buy promissory notes, or, if it had such right, it could only be exercised by the board of directors acting as a board, by consent of parties, before verdict, reported the case to this court.

If the bank could not lawfully buy the notes in question, or could only do so by its board of directors acting as such, and the judge rightly refused to admit the evidence offered, and make the rulings prayed for, a verdict was to be entered for the plaintiff for the amount received by the defendants for the Cox notes; otherwise, the case was to stand for trial.

C. R. Train & W. C. Loring, for the plaintiff.

A. Hemenway, for the defendants.

LORD, J. The question, which has been so ably and exhaustively argued by the counsel on each side, to wit, whether it is within the authority of a national bank to purchase a promissory note, in contradistinction to a discounting of it, is one which cannot properly arise in this case. The action is for money had and received by the defendants to the plaintiff's use. The answer is a denial that the defendants received the money to the plaintiff's use. It appears from the facts that the defendants received money of the plaintiff, and the real question in the case is, to whose use did they receive it. They say they received it to their own use; that they received it in payment of certain promissory notes sold and delivered by them to the plaintiff. If this be so, it is immaterial whether the plaintiff had the right to buy or not. The defendants had a right to dispose of the notes to whomsoever they chose, and if the plaintiff bought them and paid for them, it could not rescind the contract thus fully performed and executed upon the ground that it was a purchase which it had no authority to make, and recover back the money paid upon it. A corporation, acting without authority, is not in the position with the privileges of an infant to avoid an improvident contract, but in the position and subject to the liabilities and disabilities of a wrongdoer, if it exceeds its authority. It cannot complete a bargain with a third party, which such third party has a right to make, and then rescind the contract, wholly executed, if such contract proves to be an improvident one, and recover back the consideration.

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An embarrassment arises from the fact that by the terms of the report it is agreed that if the court should be of opinion that the bank had no authority to buy the notes in question, and the evidence offered by the defendants was rightly rejected, a verdict should be entered for the plaintiff. We think it entirely clear that there is omitted, by accident, from the report, the most important element, to wit, whether, upon the facts as reported, the plaintiff can avail itself of the want of authority to make the contract alleged by the defendants.

The real controversy between these parties is upon a question of fact. Was there an executed contract between them, of which the transferring of the notes upon the one side, and the payment of the money upon the other, were the respective considerations? If so, the transaction was complete, and the plaintiff cannot rescind and recover back the money paid. If, however, there was no contract between the parties; if the title to the notes had not passed to the plaintiff according to the agreement and understanding between the parties; that is, if the parties to the transaction did not understand the contract to have been made, both parties understanding that it remained wholly at the option of the plaintiff whether to purchase or not, then, whether the contract was one which the plaintiff had authority to make or not, it had not in fact made it; and if it is able to prove that the money went into the defendants' hands upon no consideration and was to be held to the plaintiff's use, unless the plaintiff should determine to consummate the contract, it will be entitled to recover. In this view, it is necessary that the case

Stand for trial.

WILLIAM H. H. TUCKER *vs.* GEORGE W. WHITE, JR.

Suffolk. March 7. — Sept. 3, 1878. COLT & SOULE, JJ., absent.

A grantee cannot maintain an action of contract upon an oral statement made by his grantor, before delivery of the deed, that the land is free from incumbrances.

An action of tort in the nature of deceit cannot be maintained against an officer, who, at a sale of land on execution, in good faith makes a statement, as of his own knowledge, that the land is free from incumbrances, when it is in fact incumbered.

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CONTRACT, with counts in tort, against a deputy of the sheriff of Norfolk. Writ dated October 3, 1876. Trial in the Superior Court, before *Wilkinson*, J., who reported the case for the determination of this court in substance as follows:

Francis A. Smith, by warranty deed in common form, dated November 26, 1844, became the owner of certain land in Stoughton, and has lived on it with his wife ever since, having no other land with a house on it. On August 14, 1876, the defendant, a deputy sheriff, sold this land with the buildings thereon, by auction, under an execution against Smith, issued in due form of law. Among other bidders present was an agent of the plaintiff, sent by him to bid on the premises. The agent bid for the property the sum of $404, and the same was sold to the plaintiff. The defendant prepared and executed a deed to the plaintiff, some days after the sale, in the usual form of a sheriff's deed, containing no covenant of warranty, except that the officer had complied with the rules of law in making sales of real estate. At that time the plaintiff read the deed and paid the defendant $404. Neither Smith nor his wife, at or before the sale, or the execution of the deed, notified the defendant that they or either of them claimed to hold an estate of homestead in the premises, exempt from being taken under the execution, and the defendant did not know whether any such estate existed or not at the time of the sale, the delivery of the deed, or at or before he paid the money to the judgment creditor. The defendant, in putting up the property for sale, stated to those present at the sale that there was no incumbrance on the estate, except the right of dower in Smith's wife, other than the execution, as of his own knowledge, to induce the plaintiff's agent to bid, and he did so bid and purchase the estate, relying on said representation, and communicated the same to the plaintiff before the latter took the deed of the premises from the defendant, and paid the consideration. The defendant did not make the statement at the sale with intent to deceive the purchaser, unless it may be inferred from the facts above stated.

At the trial, the plaintiff, claiming a rescission of his purchase, brought into court and tendered to the defendant a quitclaim deed of the plaintiff's right, title and interest in the property, in common form, running from the plaintiff to Smith, and

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filed the same with the clerk of the court the day after the trial. The plaintiff offered evidence, which was excluded, that, at the time the deed was passed, and before the consideration was paid, the defendant stated to him that the property was free from incumbrances, except said right of dower.

If the action could be maintained, judgment was to be entered for the plaintiff; otherwise, judgment for the defendant.

T. L. Livermore, for the plaintiff.

E. C. Bumpus, for the defendant.

MORTON, J. The plaintiff cannot maintain an action of contract founded upon any oral statement, made by the defendant before the deed was delivered, that the estate sold was free from incumbrances. All the previous negotiations are merged in the written contract contained in the deed. Of that contract the deed is the exclusive evidence, and the covenants contained in it cannot be enlarged by parol testimony. *Howe* v. *Walker*, 4 Gray, 318. *Earle* v. *De Witt*, 6 Allen, 520.

Upon the facts which appeared at the trial, we are of opinion that the plaintiff cannot maintain an action of tort in the nature of deceit. The report shows that the defendant, who is a deputy sheriff, sold the estate by auction under an execution against one Smith; that he "stated to those present at the sale that there was no incumbrance on the estate, except the right of dower in Smith's wife, other than the execution, as of his own knowledge, to induce the plaintiff's agent to bid, and he did so bid and purchase the estate, relying on said representation, and communicated the same to the plaintiff before the latter took the deed of the premises from the defendant, and paid the consideration;" that the officer "did not make the statement at the sale with intent to deceive the purchaser, unless it may be inferred from the facts above stated." We understand by the report that the defendant made this statement in good faith and without any intent to deceive the purchaser, and is not liable, unless from the facts stated the law infers deceit and fraud. The plaintiff contends that said Smith had an estate of homestead in the premises, and that therefore the statement of the defendant was false. If we assume this to be so, the plaintiff cannot maintain his action. The defendant made no misstatement of any facts upon which the right of Smith to an estate of homestead depended.

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The gist of an action of deceit is fraud and deceit of the defendant causing damage to the plaintiff. Ordinarily it is necessary to prove, not only that the defendant made statements of facts which were false, but that he knew them to be false. It has been held that if a man makes statements of facts, as of his own knowledge, which are false, he is liable to an action for deceit, though he believed them to be true. The falsehood consists in stating that he knew the facts when he did not know them. *Litchfield* v. *Hutchinson*, 117 Mass. 195. *Fisher* v. *Mellen*, 103 Mass. 503. *Stone* v. *Denny*, 4 Met. 151. *Page* v. *Bent*, 2 Met. 371. But this rule is confined to cases where a man states as of his own knowledge facts which are susceptible of personal knowledge. As stated by Chief Justice Shaw, in *Page* v. *Bent*, *ubi supra*, "In a matter of opinion, judgment and estimate, if one states a thing as of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter thus stated is not in fact true. The reason is, that it is apparent from the subject matter, that what is thus stated as knowledge must be considered and understood, by the party to whom it is addressed, as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had."

In the case at bar, the defendant sold the estate as an officer acting under the statute power. He had no title to or interest in the estate. The statement by him that there were no incumbrances made or suffered by the owner of the estate, was not a statement of a fact strictly susceptible of personal knowledge. Although he said that he knew there were no incumbrances, this was but a strong expression of his belief or conviction upon a matter which was in its nature a matter of opinion or judgment. The plaintiff had no right to rely upon it as an absolute statement of a fact within his knowledge. It could only fairly be understood as a statement of his strong belief, which, from the nature of the case, must be the result of an investigation which might involve, as indeed it did in this case, doubtful questions of law.

We are not called upon to decide whether, if the defendant, knowing that there existed an incumbrance upon the estate, had made the statement he did, he would be liable to an action of

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deceit. In this case, having made the statement in good faith and without any fraudulent intent, he is not liable to an action, although it was not true in fact. It follows that the plaintiff has proved no false and fraudulent statements of facts which he can rely upon as the foundation of an action of tort, or which would enable him to rescind the sale and recover back the price paid by him. *Judgment for the defendant.*

BENJAMIN H. STINSON & others *vs.* CITY OF BOSTON.

Suffolk. March 13. — Sept. 3, 1878. COLT & SOULE, JJ., absent.

A tax was assessed by a city, on May 1, to five persons jointly, as owners or trustees of a ship. The legal title to the ship was on that day in these persons, in trust to complete the ship and sell her for the benefit of themselves and others having claims against her. All the trustees, on that day, did business in the city, but were not partners, and only three of them resided there. The vessel was at a wharf in the city, at which the trustees had hired a berth, with the right to pass over the wharf to the ship, and to use the part of the wharf near the ship for storage. *Held*, that, although the three resident trustees were liable to taxation for their interests in the vessel, they could not, under the Gen. Sts. c. 11, § 12, be jointly taxed with the other trustees; and that the tax was illegal and void.

CONTRACT by Benjamin H. Stinson and four others, to recover back a tax assessed on May 1, 1876, to them as "owners or trustees" of a certain "new ship," and paid by them under protest. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

On November 10, 1875, the plaintiffs, who had certain claims against a vessel, then on the stocks in East Boston, and owned by Frank F. Gorham, acting for themselves and other like claimants, entered into an agreement with Gorham and the other claimants, by which they agreed, in consideration of the conveyance of the vessel and of the release of such claims to themselves, to complete, launch and fit her for sea, and then sell her to the best possible advantage, or, according to their best discretion and to the best advantage, sell her as she lay, or at some other stage of the work toward fitting her for sea, and apply the

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proceeds of the sale to the payment of the several claimants and of Gorham in an order named.

All the claimants, including the plaintiffs, either had liens against the vessel for labor and materials furnished in her construction, or were the assignees of a mortgage upon the vessel, or had advanced money to build her.

The ship was launched on April 11, 1876, at which time her hull had been completed by the plaintiffs, but her masts were not in. Everything below decks was complete. Her lower masts were all put in before May 1, 1876, but the rest of her spars and other rigging and sails were not put up until the latter part of July, 1876. In the early part of April, 1876, the plaintiffs made an arrangement with the owners of a wharf at East Boston, for the vessel to have a berth at that wharf upon being launched, and to pay $4.50 a day therefor, so long as the vessel should lie there. The wharf was a capacious one, capable of accommodating eight or more ships. By a berth is meant a place for a ship to lie alongside of a wharf where there are all the facilities from the shore and by water to take in ballast, stores, spars, rigging, and anything that may be needed to complete the ship and fit her for sea. The hiring a berth carries with it the right to use and pass over the strip of the wharf limited by the length of the ship, and to occupy that portion with whatever material may be brought to be put into the ship. Nothing was put aboard the ship while she lay at the wharf, until after she was sold. The vessel, having been launched, and having had her lower masts put in, was hauled to the wharf, and lay there on May 1, 1876. On that day, the upper masts and yards were in the yard of the spar-maker, in Boston, finished and ready to be put up. On July 12, 1876, the plaintiffs sold the ship by public auction, in accordance with the power given them in the agreement.

On May 1, 1876, the plaintiffs were not partners, but all of them had separate places of business in Boston, and three of them resided there, the others residing in different towns in the Commonwealth.

The tax assessed and collected was based upon the whole vessel, and upon the entire taxable value thereof, so far as the vessel was constructed on May 1, 1876.

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No sworn return or list was made by the trustees or any parties interested in the ship, and no petition made for an abatement of the tax.

If, upon the foregoing facts, the plaintiffs, or any of them, were entitled to maintain this action for the whole or any part of the tax, judgment was to be entered for such of the plaintiffs and for such sum as they or any of them were entitled to recover, with interest; otherwise, judgment for the defendant.

F. Goodwin, for the plaintiffs.

H. W. Putnam, for the defendant.

AMES, J. By the law of this Commonwealth, "all personal estate within or without this state," with certain exceptions well defined by statute, "shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May." Gen. Sts. *c.* 11, § 12. At the date of the tax in this case, the legal title to the ship was in these plaintiffs. It is true that they held the property in trust, for the benefit of themselves and others, but, within the limits and for the purposes of the trust, they had an absolute right to dispose of the vessel at their discretion. But, besides holding the legal title to the property, the plaintiffs were themselves creditors and claimants, entitled, in different proportions and degrees, — some as holders of liens, others as assignees of a mortgage, or as lenders of money towards the building of the ship, — to share in the distribution of the fund that should be derived from the intended sale. We therefore have no doubt that they had an interest in the vessel that was liable to taxation.

But as only three of them resided in Boston, and two of them resided elsewhere, the claim of the plaintiffs is that the city of Boston had no right to assess a tax upon the five jointly, and that this tax assessed upon them as joint owners, in such a state of facts, is illegal and void. It cannot be said that the owners were inhabitants of Boston at the date of the assessment. *Lee* v. *Templeton*, 6 Gray, 579. The legality of the tax against the five therefore cannot be made out, unless the case can be brought within some of the many clauses in the section above cited, under which a tax may be assessed without regard to the owner's place of residence. By the first of these clauses, it is provided that "all goods, wares, merchandise and other stock in trade,"

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"in cities or towns within the state, other than where the owners reside," "shall be taxed in those places where the owners hire or occupy manufactories, stores, shops or wharves." But we think it impossible to say that the property in the hands of these trustees can be described as "stock in trade" within the meaning of the statute. It was entrusted to them, not for any general purposes of trade or business, but only that it might be put in a condition for sale, and sold for the benefit of creditors. But independently of this difficulty, there has been no such hiring or occupation of the wharf by these plaintiffs as to satisfy the requirements of the statute. It was decided in *Lee* v. *Templeton*, *ubi supra*, that he only can be understood to occupy an estate within the meaning of the act, who is in the actual possession and has the use and efficient control of it, — such an occupation as one who owns or hires would ordinarily have. There was no occupation of the wharf as a place of business. All that can be said is merely that the vessel lay at the wharf, and there was an express or implied license to pass over the wharf in going to or returning from her. It has been decided that mere storage of lumber at a yard is not such an occupation as the statute intends. *Loud* v. *Charlestown*, 103 Mass. 278. And in *Huckins* v. *Boston*, 4 Cush. 543, it was decided that having a privilege in a counting-room, and having goods stored, in a town other than that of the owner's residence, do not amount to such a hiring and occupation of a store, shop or wharf, as will render him taxable in such town. We think that that decision covers the present case, so far as this point is concerned.

Section 15 provides, in substance, that partners in business, though residing in different places, may be jointly taxed under their partnership name in the place where their business is carried on, for all personal property employed in their business, except ships or vessels. That is to say, for the purposes of taxation a firm may be considered as a single person, and its place of business as its place of residence. But § 16 expressly provides that ships or vessels owned by a copartnership shall be assessed to the several partners in their places of residence, proportionally to their interests therein. We find nothing in the statute from which it can be inferred that joint owners of ships or vessels, who are not "partners in mercantile or other busi-

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ness," are liable to be taxed jointly at a place where they do not reside, instead of being severally assessed in their respective places of residence, proportionally to their interests in the property.

It follows that the tax was illegal and void. The defendant does not succeed in bringing it within any of the exceptions to the general rule that the owner must be taxed at his place of residence. The case of *Davis* v. *Macy*, 124 Mass. 193, upon which the defendant relies, was only to the effect that a person who is taxed for the whole of property, in which he is liable only for an undivided share, must seek his remedy by claiming an abatement. The case at bar does not present a complaint of over-valuation, but of a tax which the city had no authority to impose. The result must therefore be

Judgment for the plaintiffs.

GEORGE W. WALKER & another *vs.* J. B. MOORS.

Suffolk. March 21. — Sept. 5, 1878. AMES & MORTON, JJ., absent.

On the issue whether goods were purchased by the defendant or a third person, evidence of the plaintiff that he delivered the goods on the defendant's credit is inadmissible.

On the issue whether goods were sold to the defendant or to a third person, evidence of the plaintiff, in explanation of his having at one time made a bill of the goods to the third person, is admissible.

CONTRACT upon an account annexed for the price of three furnaces. After the former decision, reported 122 Mass. 501, the case was tried in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, the material parts of which were as follows:

It was admitted that the furnaces were put into houses owned by the defendant, but it was in dispute whether they were bought by the defendant or by George W. Meserve.

The plaintiffs offered evidence tending to prove that they were manufacturers and dealers in furnaces and similar goods; that they employed one Rice as a salesman, whose business it was to learn of houses in course of erection, solicit orders for

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furnaces, &c., from the owners or builders, and make sales to them; that it was the duty and practice of Rice to report all sales to them for their acceptance or rejection, but that no notice of any limitation on his powers was given to the defendant or to any one else.

The plaintiffs called Rice, as a witness, who testified that the defendant ordered the furnaces of him on a certain day, and to his conversation with the defendant, during which the order was given.

Horace E. Walker, one of the plaintiffs, who was not present at the conversation between Rice and the defendant, after testifying that Rice communicated to him on the same day the defendant's order, which the plaintiffs accepted and upon which they delivered the furnaces, in reply to the question, "Upon whose credit did you deliver the goods?" answered, under the objection of the defendant, "J. B. Moors'."

The defendant offered evidence tending to show that, under an agreement in writing between Meserve and himself, Meserve finished the houses into which the furnaces were put; that all the contracts for such finishing were made and all materials and labor ordered by Meserve in his own name; that he had nothing to do with any of them; and that Meserve bought the furnaces of Rice, who was then personally indebted to him, with the understanding that they were to be set off against that account. The defendant's bookkeeper testified that, after the furnaces were set, the plaintiffs' collector presented a bill several times which was made out to Meserve, and that no bill made out to the defendant was presented until after Meserve failed to pay. On cross-examination, he testified that when the bill was presented he told the collector that the bill for the furnaces in question should be made to Meserve, and the bill was taken away; that after the furnaces were set, the collector presented a bill of the same several times to Meserve, which was made out to him; and that no bill for them was presented to the defendant until after Meserve failed to pay.

Horace E. Walker, called in rebuttal, in reply to the question, "State what you know of the bill which was made out to George W. Meserve?" answered, under the objection of the defendant, "Moors' bill, which was rendered him, was handed to me with

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the request that that portion of the bill relating to the furnaces be made out to George W. Meserve. It was done so; and the bill was carried to Moors' office for Meserve;" in reply to the question, "Did you direct the bookkeeper to make it out?" he answered, "I did;" and in answer to the question, "Did you make any charge or give any credit when that new bill was made out? Did you give any credit to Meserve?" he replied, "I gave no credit to Mr. Moors, and charged nothing to George W. Meserve, and never have since to George W. Meserve."

The plaintiffs' counsel, in his closing argument to the jury, having called attention to the following clause in the agreement between Meserve and the defendant, "and should J. B. Moors enter into any engagements with regard to said property, I will save him harmless on account of same," contended that at the time of its execution the parties thereto must have contemplated that the defendant might enter into engagements similar to the one sought to be enforced in this case. The defendant requested the judge to rule that this was not the meaning and effect of the agreement. The judge declined so to instruct the jury, but instructed them, as matter of law, that the clause "covers any engagement or contract which Moors might thereafter enter into with regard to the construction of the houses, and would cover the case of furnaces ordered by him after that time."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

R. M. Morse, Jr., for the defendant.

N. Morse & C. Cobb, for the plaintiffs.

LORD, J. The question in this case is, which one of the two parties actually purchased the three furnaces which the plaintiffs sold, and the price of which they seek to recover in this action. There is involved in it no question of original or collateral liability. When that is the question, and the defendant denies his liability, upon the ground that his engagement is a collateral engagement, and therefore necessary to be in writing to obviate the objection of the statute of frauds, it is a material inquiry whether any credit whatever was given to the party to whose promise the defendant's promise is claimed to be collateral; for if any credit whatever was thus given, the defendant's engagement would be collateral and not original. In this case, the sale

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was made, not by the plaintiff himself, but by Rice, who was his agent and who testified to the facts in relation to the sale. The plaintiff had no interview with the defendant before the sale; and all the knowledge which he had upon the subject was derived from the statements made to him by Rice; and the fact that he delivered the goods upon Rice's statement was a competent fact; but upon whose credit he delivered them was not only an immaterial fact, which he could have determined only by his own construction of the language which Rice communicated to him, and incompetent, but was one which was calculated to mislead and bias the jury. Rice was bound to report to him the exact interview which he had with the defendant. If those facts created the relation of purchaser and seller between the parties, he was justified in making the delivery and claiming the price of the defendant. But his statement, that he delivered the goods upon the credit of the defendant, is merely another mode of giving his construction to language which might or might not have been sufficient to create a contract between the parties, which, under no circumstances, could be competent evidence. The language, as testified to by Rice at the trial, is claimed by the defendant to have been, if not equivocal and uncertain, insufficient to show that the defendant entered into the contract, and the plaintiffs' interpretation of that language in the absence of the defendant could only tend to his prejudice. The exception to the admission of that testimony must therefore be sustained.

A further exception is taken to the instruction of the court in relation to the legal effect of a certain agreement entered into between the defendant and one Meserve. Inasmuch as that question was raised under somewhat peculiar circumstances, and as it is not probable that in a future trial the question will again arise and be passed upon in the same language, particular criticism of the language used by the presiding judge in his construction of that contract is unnecessary. It appeared in the course of the trial that at one time a bill of these furnaces was made to Meserve, and we think that the plaintiffs were properly allowed to give their explanation of the circumstances under which the bill was thus made; and, though it is quite apparent that the bill of exceptions contains a misprint in using the word "Moors" for "Meserve," we see no objection to the question or

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answer of the witness, so far as it was simply applicable to and in explanation of the bill thus made.

Exceptions sustained.

JOSHUA W. DANIELS *vs.* ROLFE ELDREDGE & others.

Middlesex. Jan. 18. — Sept. 28, 1878. COLT & ENDICOTT, JJ., absent.

A testator, by his will, gave his estate to trustees, with power to change the investment of any portion thereof and of its accretions, in trust to pay a certain annuity to his mother during her life, and, subject to this provision, to apply such portion of the income, as they might from time to time see fit, to the education and maintenance of the son until he should reach the age of twenty-five years, and then to convey the estate, with all accretions thereof, to him in fee; provided that they might in their discretion convey the same or any part thereof to him at any time after his arriving at the age of twenty-one years. If the son should die before reaching the age of twenty-five years, leaving a widow and children, the trustees were to pay half the income to his widow, and to apply so much of the rest as they might from time to time see fit to the education and maintenance of his children, until the youngest child arrived at the age of twenty-one years, and then to convey the whole estate and all accretions thereof, in equal shares in fee, to the survivors of the widow and children and to the issue of any deceased child by right of representation; provided that the same or any part thereof, concerning which the son should have made a will after arriving at the age of twenty-one years, should be disposed of as therein directed. If the son should die leaving no issue or widow, the trustees were to pay the income to the testator's widow for life, and after her death convey the remainder in fee to certain brothers and sisters of the testator. *Held*, that the son took an interest in the principal, which equity would apply to the payment of his debts.

BILL IN EQUITY against Rolfe Eldredge, the trustees under the will of Edward H. Eldredge, and Amariah Taft, to reach and apply the fund in the hands of the trustees in payment of a debt due from Rolfe Eldredge, the son of the testator, to the plaintiff.

The bill alleged that the testator, by his will, dated April 22, 1859, gave all his estate, real or personal, to trustees named, upon the following trusts:

"First. To pay my mother an annuity of three hundred dollars each year during her life, in equal quarterly payments, the first of which shall be made at the expiration of three months from the day of my death; and all subsequent provisions of this my will are to be construed with reference to this provision.

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"Secondly. To apply such portion of the income thereof, as they may from time to time see fit, to the proper and liberal education and maintenance of my said son until he shall reach the age of twenty-five years; and then to convey, transfer and pay over the whole of said estate and all accretions thereof then in their hands to him the said Rolfe, to the use of him and his heirs forever; provided that, if in their judgment it will be best for his interest to convey, transfer and pay over the same or any portion or portions thereof, at any earlier time or times after he shall have reached the age of twenty-one years, they may do so.

"Thirdly. If my son shall die before reaching the age of twenty-five years, leaving a widow and child or children, then to pay over one half of said income to his widow, and devote such portion of what shall not be so paid to said widow, as they may from time to time see fit, to the handsome maintenance and liberal education of such child or children, until such child or the youngest of such children shall have arrived at the age of twenty-one years; and then to convey, distribute, transfer and pay over the whole of said estate and all accretions thereof, in equal shares, to the survivors of the said widow and said child or children, share and share alike, to their own sole use forever and that of their respective heirs; provided that, if any such child shall have died leaving issue, such issue shall take by representation the share which its parent would have taken if one of said survivors; and provided also that if, after his arrival at the age of twenty-one years, my said son shall die leaving a widow or issue and a last will and testament duly executed, the said estate and accretions, or any part thereof to which such will may refer, shall be disposed of as shall be directed in and by his said will.

"Fourthly. If my son shall die without issue and leaving no widow, then to pay over the whole net income aforesaid to my said wife during her life, to her own sole and separate use, and after her death to convey, distribute, transfer and pay over the whole remainder of said estate in equal portions to" brothers and sisters of the testator.

The bill further alleged that the will also authorized the trustees to change the investment of any portion of the said estate and accretions from real to personal estate, or from personal

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to real estate, as fully and thoroughly as the testator could have done himself.

The bill further alleged that the will was duly admitted to probate, and that the trustees accepted the trust and held under it a large amount of real and personal property; that Rolfe Eldredge and George O. Marcy, formerly copartners in business, made two promissory notes payable to the order of the plaintiff, the amount of which they owed the plaintiff; that Taft contended that Rolfe Eldredge had assigned his interest in the trust property to him; and that Rolfe Eldredge had attained the age of twenty-one years, but had not reached the age of twenty-five years, and had no property liable for his debts known to the plaintiff, except his interest in said trust property.

The prayer of the bill was for an account; that the assignment to Taft might be set aside, or, if held by him as security, that the trust property, after the payment of the debt due to him, might be applied to the plaintiff's debt; that the plaintiff might not be required to make Marcy, who was beyond the process of the court, a party; for an injunction, and for further relief. The defendants demurred for want of equity.

The case was heard on the bill and demurrer by *Ames*, J., who reserved the case for the consideration of the full court.

T. G. Kent, for the defendants.

S. H. Tyng, (*H. E. Fales* with him,) for the plaintiff.

GRAY, C. J. By the provisions of the will, the trustees take the estate, real and personal, of the testator, (with power to change the investment of any portion thereof, and of the accretions thereon, from real to personal estate, and from personal to real estate,) in trust to pay an annuity of $300 to the testator's mother during her life, and, subject to this provision, to apply such portion of the income, as they may from time to time see fit, to the education and maintenance of the son until he shall reach the age of twenty-five years, and then to convey the estate, with all accretions thereof, to him in fee; provided, that they may in their discretion convey the same or any part thereof to him at any time after his arriving at the age of twenty-one years. If the son dies before reaching the age of twenty-five years, leaving a widow and children, the trustees are to pay half the income to his widow, and to apply so much of the rest, as

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they may from time to time see fit, to the maintenance and education of his children, until the youngest child arrives at the age of twenty-one years, and then to convey the whole estate and all accretions thereof, in equal shares, in fee, to the survivors of the widow and children, and to the issue of any deceased child by right of representation; provided that the same, or any part thereof, concerning which the son shall have made a will after arriving at the age of twenty-one years, shall be disposed of as therein directed. If the son dies leaving no issue or widow, the trustees are to pay the income to the testator's widow for life, and, after her death, convey the remainder in fee to brothers and sisters of the testator.

By the effect of these provisions, the trustees took, in the first place, only an estate for the life of the testator's mother, and an estate for years, determinable on the testator's son's attaining the age of twenty-five years, or on his death before that time; and the son took, after or subject to these estates for life and for years, an estate in fee. *Doe* v. *Nicholls*, 1 B. & C. 336; *S. C.* 2 D. & R. 480. *Smithwick* v. *Jordan*, 15 Mass. 113.

It would seem that this estate of the son was a vested remainder immediately upon the death of the testator, though subject to be defeated by the death of the son before arriving at the age of twenty-five years. *Goodtitle* v. *Whitby*, 1 Burr. 228; *S. C.* 1 Kenyon, 506. *Bromfield* v. *Crowder*, 1 New Rep. 313. *Doe* v. *Moore*, 14 East, 601. *Fox* v. *Fox*, L. R. 19 Eq. 286. *Doe* v. *Considine*, 6 Wall. 458. *Blanchard* v. *Blanchard*, 1 Allen, 223. 4 Kent Com. 204.

But if such estate of the son was in the nature of a contingent remainder, his interest in that contingent estate was vested, and capable of being alienated by him, and of passing by assignment in insolvency or bankruptcy; and this bill may therefore be maintained to apply to the payment of his debts his interest in the property, real and personal, so held in trust. *Gardner* v. *Hooper*, 3 Gray, 398. *Pierce* v. *Lee*, 9 Gray, 42. *Nash* v. *Nash*, 12 Allen, 345. *Minot* v. *Tappan*, 122 Mass. 535. *Sparhawk* v. *Cloon*, *ante*, 263. *Demurrer overruled.*

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IVORY WITT *vs.* MAJOR W. POTTER & others.

Berkshire. September 10, 1878. AMES & SOULE, JJ., absent.

In an action of contract, the declaration alleged that the defendants executed a bond to the plaintiff, and set forth a copy of the bond, (which was in the usual form of a bond given by a petitioner to vacate and set aside a judgment, under the St. of 1875, *c.* 33, and executed by one of the defendants as principal and the others as sureties,) and alleged that the judgment described in the condition of the bond was not vacated or set aside; that the principal defendant had not paid or satisfied the judgment or the execution issued thereon; that the judgment remained unpaid and unsatisfied, and that the defendants owed the plaintiff the amount of the judgment. *Held*, that the declaration was upon the bond and not upon the judgment; that objections to the form of the declaration could only be taken advantage of by demurrer; and that exceptions to a ruling that the plaintiff was entitled to recover on the declaration must be overruled, with double costs.

CONTRACT against Major W. Potter, Robert Noble and M. M. Gavitt. The declaration was as follows:

"And the plaintiff says the defendants executed to him a bond as follows, to wit: Bond — Copy. Know all men by these presents: That I, M. W. Potter of Pownal, in the State of Vermont, as principal, and Robert Noble and M. M. Gavitt of Williamstown, county of Berkshire, Massachusetts, as sureties to said Potter, are bound and obliged hereby unto Ivory Witt, surviving partner of the firm of Alford & Witt, in the penal sum of eight hundred dollars, to the true payment of which to the said Witt, his executors, administrators and legal representatives, we bind ourselves and each of us, our and each of our heirs, executors and administrators. Sealed with our seals and dated this 28th day of February, A. D. 1877. The condition of this bond is such, that whereas said H. W. Potter has filed a petition, or is about to file a petition, in the Superior Court for said county of Berkshire against said Ivory Witt, surviving partner of Alford & Witt, to obtain a review of a judgment rendered March 17, 1876, in the Superior Court for said county of Berkshire against him, the said Potter, for damages $321.77 and costs of suit $13.37 in an action of contract, and to have said judgment vacated and set aside; now if said judgment shall not be vacated upon said petition, and if the said Potter shall satisfy the same if not vacated and all costs accrued on any execution issued

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therein, or in case said judgment is vacated, if said Potter shall satisfy any execution which may issue in favor of said Witt on any judgment which may be rendered in the review or in the proceedings under said petition, then this obligation shall be void, otherwise to remain in full force.

"Signed, sealed and delivered in presence of
"K. Danforth.
"H. T. Tallmadge.

M. W. Potter [seal.]
Robert Noble [seal.]
M. M. Gavitt [seal.]

"And the plaintiff says further that the judgment mentioned and described in the condition of the said bond, to wit, the judgment which the said Major W. Potter petitioned to have vacated and set aside by said proceedings in review, was not so vacated and set aside as petitioned by said Potter.

"And the plaintiff says that said Potter has not paid or satisfied the judgment nor the costs of suit to recover the same. And the said Potter has not paid the execution issued on the said judgment, and that said judgment as to both damages and costs still remains unpaid and unsatisfied.

"And the plaintiff says the defendants owe him the amount of said judgment, to wit, the sum of three hundred twenty-one dollars and seventy-seven cents damages and thirteen dollars and thirty-seven cents costs of suit and interest on the same."

The answer contained a general denial; alleged that the judgment mentioned in the declaration had been paid and satisfied; that the judgment had been obtained by the fraud and deceit of the plaintiff; that Potter had fulfilled all the obligations imposed on him by the bond; and "that no legal cause of action is set forth against any one or all of the defendants according to law, and no valid judgment can be rendered by this court thereon."

At the trial in the Superior Court, before *Dewey*, J., the plaintiff offered in evidence the record of the proceedings upon the petition for review. The defendants objected to the same as not being competent or legal for any purpose under the pleadings, but the judge admitted it. It appeared from the record that the judgment had not been vacated, and that the petition had been dismissed. The plaintiff then offered in evidence a bond, which was admitted by the defendants to be their genuine bond, exe-

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cuted and delivered by them to the plaintiff upon the petition for review, and of which the bond declared on is a copy; and it was proved or admitted that the judgment and costs named in the bond had in no part been paid or satisfied. No other evidence was introduced.

The defendants asked the judge to rule, as matter of law, that the action could not be maintained, because no cause of action was substantially set forth as required by law; and that the jury must find that the bond declared on was the bond signed and executed by the defendants, or the action could not be maintained. But the judge refused so to rule, and ruled that the declaration was substantially sufficient in law, and the action could be maintained; and directed the jury to return a verdict for the plaintiff for the penalty named in the bond. The defendants alleged exceptions.

A. J. Waterman, for the defendants. By the practice act, a declaration on a bond must not only set forth the conditions of the bond, but assign the breaches relied on, and aver performance of all conditions precedent to the right of the plaintiff to recover; all substantive facts necessary to constitute the cause of action must at least be stated with substantial certainty, and the omission to do so may be objected to either by the answer or by request for a ruling at the trial. Gen. Sts. *c.* 129, § 2, *cls.* 3, 9, 10; §§ 81, 87. *Hollis* v. *Richardson*, 13 Gray, 392. *Read* v. *Smith*, 1 Allen, 519. *Murdock* v. *Caldwell*, 8 Allen, 309. *Hotchkiss* v. *Judd*, 12 Allen, 447. *Rogers* v. *Newbury*, 105 Mass. 533. *Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502. Buswell & Walcott's Mass. Pract. 265, 276. The declaration in the present case sets forth a bond supposed to have been filed under the Gen. Sts. *c.* 146, § 19, as amended by the St. of 1875, *c.* 33; and is defective in not averring the rendition of the judgment and its existence in favor of the plaintiff, the filing of the petition for a review and the action of the court thereon, and the approval of the bond by a judge of the court in which the judgment was rendered. And it cannot be gathered or understood from the declaration whether the action is upon the bond or upon the judgment.

A. G. Potter, for the plaintiff, was not called upon, and moved for double costs.

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BY THE COURT. The declaration is evidently upon the bond executed by all the defendants, and not upon the judgment rendered against the defendant Potter only. The objections made in argument are to matter of form and not of substance, and could not be taken otherwise than by demurrer, specially assigning the causes. Gen. Sts. *c.* 129, §§ 11, 12. *Clay* v. *Brigham*, 8 Gray, 161. *Huntress* v. *Burbank*, 111 Mass. 213.

Exceptions overruled, with double costs.

JULIA M. EDMUNDS *vs.* JARVIS ROCKWELL, administrator. JOAB EDMUNDS & others *vs.* SAME.

Berkshire. Sept. 10. — 23, 1878. AMES & SOULE, JJ., absent.

If the estate of a deceased person is represented insolvent, and commissioners are appointed to determine the claims of creditors presented to them, the real estate may, after the expiration of two years from the granting of letters of administration, rightly be ordered by the Probate Court to be sold for the payment of debts, proved before the commissioners within the two years.

APPEALS by the widow and heirs at law of Joseph Edmunds from a decree of the Probate Court, by which Jarvis Rockwell, the administrator *de bonis non* of Edmunds, was licensed to sell the real estate of his intestate, for the payment of debts. At the hearing, before *Colt*, J., the following facts appeared:

Joseph Edmunds died on April 20, 1875. His widow and one Crandall were appointed administrators on May 4, 1875, and gave bond and notice, as required by law, before June 1, 1875. The estate was represented insolvent, and on December 7, 1875, commissioners were appointed, whose report was allowed on May 1, 1877, showing a trifling amount due preferred creditors, and about $27,000 due to many general creditors of the estate. The administrators resigned, and Rockwell was appointed administrator *de bonis non* on October 5, 1876. He obtained a license to sell real estate to a specific amount for the payment of debts on January 1, 1877, under which license the greater part of the real estate of the intestate was sold, but the amount realized proved insufficient for the payment of all the debts. The

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first account of administration was allowed on May 1, 1877, and on the same day a distribution of part of the assets among the creditors whose claims had been proved was decreed, by which the general creditors received ninety per cent. of their claims proved.

On September 4, 1877, the administrator *de bonis non* was further licensed, upon another petition, to sell the whole of the real estate of the intestate, for the payment of the balance of the debts proved before the commissioners, and from the decree granting this license the appellants appealed. The estate is insolvent, and no new assets have come to the hands of the administrator.

The appellants contended that by the Gen. Sts. *c.* 97, § 5, the lien of the creditors upon the assets of the estate was discharged; and that a license to sell the real estate could not be legally granted to the administrator. The judge ruled otherwise; and ordered the decree of the Probate Court to be affirmed. The appellants alleged exceptions.

T. P. Pingree, for the appellants.

J. Rockwell, pro se.

GRAY, C. J. When the personal estate of a deceased person is insufficient to pay his debts, his executor or administrator may sell his real estate for that purpose, upon obtaining a license therefor. Gen. Sts. *c.* 102, § 1. The executor or administrator, having given bond and published due notice of his appointment, is not indeed liable to an action at law by any creditor, unless it is commenced within two years from the time of his giving bond, except in case of new assets received afterwards, or of a failure by defect in form or service of an action brought within the two years, or of a right of action accruing after the expiration of the two years and before the settlement of the estate. Gen. Sts. *c.* 97, §§ 5 *& seq.* *Blanchard* v. *Allen*, 116 Mass. 447. But if the estate is represented insolvent, the creditors may prove their debts against it before commissioners appointed for the purpose, and it is the duty of the Probate Court to order, and of the executor or administrator to make, distribution of the assets among the creditors to the extent of the claims proved; and the creditors cannot, after the representation of insolvency, maintain actions at law against him, unless upon a demand entitled to a

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preference, or the estate proves solvent. Gen. Sts. *c.* 99, §§ 2, 17, 19, 20, 25.

It is as much the duty of the executor or administrator, so far as the estate is sufficient for the purpose, to pay debts established by proof seasonably presented to commissioners, as to pay debts established by judgment in an action seasonably commenced against himself. If there had been neither action brought nor commissioners appointed within the two years, the debts would have been wholly barred by the special statute of limitations, and therefore the real estate could not have been afterwards sold to pay them. *Aiken* v. *Morse*, 104 Mass. 277. *Tarbell* v. *Parker*, 106 Mass. 347. But in the very cases in which it was so held it was clearly recognized that real estate might be lawfully sold after the expiration of the two years to pay debts which had been presented to commissioners within that time. 104 Mass. 279. 106 Mass. 349. See also *Bacon* v. *Pomeroy*, 104 Mass. 577, 583; *Palmer* v. *Palmer*, 13 Gray, 326, 328; *Freeman* v. *Ward*, 16 Pick. 201; *Guild* v. *Hale*, 15 Mass. 455. In the present case, the debts having been presented to commissioners and allowed by them within the two years, the real estate was rightly ordered to be sold for the payment of the debts so proved. *Exceptions overruled.*

FRANKLIN SAVINGS INSTITUTION *vs.* JOHN REED.

Franklin. September 17, 1878. ENDICOTT & SOULE, JJ., absent.

If a joint and several promissory note payable on demand, and signed by A., and by B. as surety, contains an agreement on its face, below the signatures, that A. is not to be compelled to pay the note before a certain time, an action cannot be maintained against the surety before the expiration of that time; and the defence that the action is prematurely brought may be pleaded in bar.

In an action on a promissory note to recover principal and interest, the defence was that the action was prematurely brought; and, at the trial, the attention of the judge was not called to the question whether interest was due or not. The plaintiff excepted to a ruling directing the jury to return a verdict for the defendant on the ground that the action was prematurely brought. *Held*, that the plaintiff could not in this court contend that the action might be maintained for the interest.

CONTRACT. Writ dated May 26, 1877. The declaration alleged that the defendant and Benjamin W. Reed made the fol-

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lowing promissory note; that Robbins, the payee named therein, indorsed the same to the plaintiff; and that the defendant owed the plaintiff the balance of said note and interest thereon:

"$2600. December 5th, 1870. For value received we jointly and severally promise to pay Edward A. Robbins or order twenty-six hundred dollars on demand, with interest annually at 7 per cent., interest to commence April 1st, 1871.

"Benjamin W. Reed.
"John Reed, Surety.

"It is understood and agreed that the said B. W. Reed is not to be compelled to pay said note before April 1st, 1881."

The defendant filed the following answer: "And now comes the defendant in the above entitled action, and says the action is prematurely brought. And he further says that the payee of said note, for a good and valuable consideration, and at the time said note was given, agreed that said Benjamin W. Reed, who was the principal named in said note, should not be compelled to pay the note declared on before April 1st, 1881. And therefore the defendant, who was a surety only in said note, was not at the time the action was commenced, and is not now, liable to the action."

At the trial in the Superior Court, before *Pitman*, J., it appeared that the memorandum at the bottom of the note was made before the delivery of the note to the original payee. The plaintiff contended and asked the judge to rule that the defendant, by his answer, had waived any defence he may have had that the action was prematurely brought; and that the action could be maintained. But the judge ruled that the defendant had not waived such defence, and that the action was prematurely brought; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

A. De Wolf, for the plaintiff. The defendant is not included in the terms of the agreement not to sue until April 1, 1881. The note, being joint and several, contains three contracts, namely, a joint contract by the signers, and a several contract of each of them. *King* v. *Hoare*, 13 M. & W. 494, 505. The fact that the defendant is designated as a surety does not change the legal effect of the contract, and for the purposes of the case he is to be treated as a principal. *Harris* v. *Brooks*, 21 Pick. 195.

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An agreement not to sue one joint promisor does not discharge the other. *Price* v. *Barker*, 4 El. & Bl. 760. *Harrison* v. *Close*, 2 Johns. 448. *Draper* v. *Weld*, 13 Gray, 580. An express covenant not to sue the principal debtor for a certain time does not discharge a surety. *Perkins* v. *Gilman*, 8 Pick. 229. 2 Pars. Cont. (6th ed.) 27. At all events, interest is payable annually, and may be recovered in this action.

S. T. Field, for the defendant, was not called upon.

GRAY, C. J. The memorandum written upon the note before its delivery was part of the contract; and by its manifest intention and legal effect neither Benjamin W. Reed, the principal, nor John Reed, who appeared on the face of the note to be a surety, was bound to pay the note until April 1, 1881. *Heywood* v. *Perrin*, 10 Pick. 228. That the action was prematurely brought was rightly pleaded in bar. *Benthall* v. *Hildreth*, 2 Gray, 288. No claim to recover interest was made or ruled on at the trial, or can be asserted for the first time in this court.

Exceptions overruled.

PATRICK MUNDE *vs.* JASPER E. LAMBIE & another.

Hampshire. Sept. 17. — 18, 1878. ENDICOTT & SOULE, JJ., absent.

If a bill of exceptions, allowed by the judge at the first trial of a case, and containing statements material to the issue, is, at the second trial, taken to the jury room and read by the jury or any of them, it is sufficient ground for a new trial; and misconduct by the party, in whose favor the verdict is rendered, need not be shown.

If a paper is improperly read by a jury or any of them during their deliberations, and, for this reason, a motion for a new trial is duly filed, the order of the Superior Court overruling this motion is a decision upon a question of law, which may be brought to this court by a bill of exceptions.

CONTRACT. After the decision reported 122 Mass. 336, a second trial was had in the Superior Court, resulting in a verdict for the plaintiff, which the defendants moved to set aside, because the jury carried out with them, into the jury room, and kept there during their deliberations, the bill of exceptions,

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drafted by the plaintiff's counsel and allowed by the court after the first trial and verdict for the defendants, which was read by the jury or in their hearing during such deliberations. The motion was overruled by *Allen*, J., who allowed a bill of exceptions, stating the facts that appeared upon the hearing of the motion as follows:

One of the jury was permitted to testify, against the plaintiff's objection, that the bill of exceptions, (by which it appeared that a verdict was returned at the former trial for the defendants, and that the plaintiff alleged exceptions to certain rulings of the judge,) was handed to the jury by the officer in charge of them, with the other papers in the case; that some of the jurors read the same; and that, at the request of some of the jury, he read it aloud two or three times. It appeared that the jury were out from four o'clock in the afternoon until ten o'clock the next forenoon, and the witness, on cross-examination, testified that the jury did not agree until about three minutes before they came in with their verdict. There was no other evidence.

The defendants asked the judge to rule that, if he was satisfied that the bill of exceptions was in the jury room, and was read by the jury or any of them during their deliberations, then a new trial should be granted; but the judge declined so to rule, and, finding that there was no misconduct, overruled the motion. The defendants alleged exceptions.

W. G. Bassett, for the defendants.

A. J. Fargo, for the plaintiff.

GRAY, C. J. The bill of exceptions tendered by the plaintiff and allowed by the judge at the first trial was not competent evidence to be laid before the jury at the second trial. As the statements therein were material to the issue and may have prejudiced the defendants, it was not necessary to show misconduct on the part of the plaintiff in bringing the paper before the jury. The refusal of the judge, at the hearing of the motion to set aside the last verdict, to rule, as requested by the defendants, that, if he was satisfied that the paper was in the jury room and was read by the jury or any of them during their deliberations, a new trial should be granted, was an erroneous ruling in matter of law, and a subject of exception. Gen. Sts. *c.* 115, § 7. *Whit-*

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ney v. *Whitman*, 5 Mass. 405. *Hix* v. *Drury*, 5 Pick. 296, 302. *Alger* v. *Thompson*, 1 Allen, 453. *Woodward* v. *Leavitt*, 107 Mass. 453, 462, 466, 467. *Exceptions sustained.*

HAMILTON F. DOWNING & others *vs.* CHARLES ELY & another.

Hampden. September 24. — 25, 1878. AMES & SOULE, JJ., absent.

On the issue whether a promissory note was obtained by duress, the judge refused to rule, as requested by the plaintiff, that "if the plaintiff believed that he had a good cause of action against the defendant, and undertook to collect his claim by attachment of property, and the defendant, to get rid of or prevent such attachment, gave the note in question, then there was no such duress as would avoid the note, although the jury should believe that at the time the plaintiff did not have any cause of action;" but ruled that "if the plaintiff had or thought he had a good claim against the defendant, or a doubtful claim, and in pursuance thereof made the attachment of the defendant's property, or threatened to attach, and the defendant gave the notes in suit either to settle a doubtful claim or to relieve his property from attachment, or to prevent an attachment, then the consideration of the note was good." *Held*, that the plaintiff had no ground of exception.

CONTRACT upon seven promissory notes. The answer set up want of consideration, and that the notes were obtained by fraud and duress.

At the trial in the Superior Court, before *Gardner*, J., there was evidence that the plaintiffs, claiming to have a cause of action against the defendants, caused the goods in the defendants' shop to be attached, and that the defendants, in settlement of this claim, and to obtain a release of the attachment, gave the notes in suit.

It also appeared that, some weeks before the attachment, the defendants, being indebted to the plaintiffs and others, made a composition, under seal, with their creditors, by which they paid fifty cents on the dollar, and obtained a release of the residue of their indebtedness.

The plaintiffs put in evidence tending to show that the defendants, at the time the composition deed was given, failed to disclose all their property to their creditors, and kept back a portion of it; and contended that they had a good cause of action against the defendants, at the time of the attachment, for the balance of their debt.

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The defendants' evidence tended to show that they made a full disclosure to their creditors, and kept back no part of their property; that the notes in suit were given to prevent the attachment; that the defendants would not have given them but for the threats made by the plaintiffs to shut up their shop; and that the plaintiffs fraudulently used the writ against the defendants to obtain the notes.

The plaintiffs asked the judge to instruct the jury that if the plaintiffs believed that they had a good cause of action against the defendants, and undertook to collect their claim by attachment of property, and the defendants, to get rid of or prevent such attachment, gave the notes in question, then there was no such duress as would avoid the notes, although the jury should believe that at the time the plaintiffs did not have any cause of action. The judge declined to instruct the jury as requested, but instructed them that if the plaintiffs had or thought they had a good claim for such balance against the defendants, or a doubtful claim, and in pursuance thereof made the attachment of the defendants' property, or threatened to attach, and the defendants gave the notes in suit, either to settle a doubtful claim or to relieve their property from attachment, or to prevent an attachment, then the consideration of the notes was good; but if the plaintiffs fraudulently threatened to attach the defendants' property upon a groundless suit, for the purpose of compelling the defendants to give the notes in suit, to relieve their property from attachment upon such a suit, or to prevent it, and the defendants were solely induced thereby to give the notes in suit, then the notes were not given voluntarily, were without consideration, and the plaintiffs could not recover.

The jury returned a verdict for the defendants, and found specially that the defendants gave these notes solely and exclusively for the purpose of preventing their property from being attached, or to relieve their property from attachment.

The judge reported the case for the consideration of this court. If the instructions prayed for should have been given, or if the instructions given were erroneous, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict.

G. Wells, for the plaintiffs.

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G. M. Stearns, for the defendants.

BY THE COURT. The instructions given, although not using the word "duress," covered the whole matter of the request, and were quite as favorable to the plaintiffs as the instruction asked for. *Judgment on the verdict.*

JAMES DONOVAN & others *vs.* CITY OF SPRINGFIELD.

Hampden. September 25. — 27, 1878. AMES & SOULE, JJ., absent.

On a petition for damages occasioned to different lots of land abutting on a street, by reason of raising the grade of the street, one of the petitioners testified, on cross-examination, against the petitioners' objection, that, before the grade of the street was raised, there was standing water on the lots of some of the petitioners; but there was no evidence upon which of the petitioners' lots the water was standing. *Held*, that no error appeared in the admission of this evidence.

On a petition for damages occasioned to the abutters on a street, by reason of raising the grade of the street, evidence that damages had been awarded to abutters other than the petitioners is *res inter alios*, and incompetent as an admission by the city.

On a petition for damages occasioned to the abutters on a street, by reason of raising the grade of the street, benefits derived from the situation of the petitioners' lands with reference to the street in question, enhancing their value in that regard, are direct and special, and are to be allowed in set-off, although the same benefit may be common to all the property on the street.

PETITION, under the Gen. Sts. *c.* 44, §§ 19, 20, to the county commissioners, by fifteen owners of different lots of land on Sharon Street in Springfield, for a jury to assess the damages sustained by their respective estates, by reason of raising the grade of Sharon Street.

At the trial, before the jury, it was admitted that Sharon Street was duly laid out and accepted by the city as a public street on October 21, 1872, but no grade was then established. There was evidence tending to show that after this order was passed, some work was done by the city to better fit the street for travel, but no change of grade was made until after May 25, 1874, at which time it was admitted that the city, upon petition, by proceedings duly had, ordered a sidewalk to be laid out, established and constructed on both sides of Sharon Street, from Main Street to Chestnut Street, about fifteen hundred feet, with

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specified grades the entire length of Sharon Street, and that when the sidewalks were built they were constructed at the grade established by said order, and that the roadway between the sidewalks was then raised so as to conform to the grade of the sidewalk.

The petitioners introduced evidence tending to show that in carrying out the order of May 25, 1874, the sidewalks and the roadway were raised in front of the petitioners' premises and dwelling-houses from two to six feet, and that this work was done in 1874 and 1875, and that the petitioners' premises were situated on different parts of the street. The respondent contended that the land through which the sidewalk was laid was originally marshy and swampy for the greater part of the way, and that the petitioners' property was bettered by the proceedings of the city, so as to fully offset all damages.

One of the petitioners was permitted to testify, upon cross-examination, against the petitioners' objection, that there was standing water on some of the lots of the petitioners in 1868. He also testified that some of the petitioners' lots were filled between 1868 and 1874, to the depth of as much as six inches; and that there was no water upon his lot at the time of the passage of the order in 1874. But it did not appear from any testimony in the case upon which of the petitioners' lots this water was standing.

The respondent also contended that a part of the work done by the city, on account of which the petitioners claimed damage, was done under the order of 1872, and not under the order of 1874; and that the petitioners were not entitled in these proceedings to recover for any damages sustained by them.

The petitioners, in reply, offered in evidence a certified copy of the record of the entire proceedings of the mayor and aldermen in relation to the location of Sharon Street as a public street, which showed that damages had been awarded abutters other than the petitioners. The sheriff, at the request of the respondent, excluded that part of the record relating to damages awarded to parties other than these petitioners.

The jury were instructed that they were to consider whether the work done on Sharon Street was done under the order of 1872, or under the order of 1874.

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The sheriff, in connection with other appropriate instructions relating to setting off betterments, also instructed the jury, against the petitioners' objection, as follows: "All such benefits as come from the situation of the lots with reference to the grade of the street, affecting their value, such as having a dryer and pleasanter street in front of the lots, and having more convenient access to the lots, are direct and special, and must be set off against the damages. And this is true, although the same benefit may be common to all the property on the street."

The jury awarded as damages one dollar to each of the petitioners. In the Superior Court the verdict was accepted; and the petitioners appealed to this court.

M. B. Whitney & A. M. Copeland, for the petitioners.

M. P. Knowlton, for the respondent, was not called upon.

GRAY, C. J. 1. It does not appear from the certificate of the sheriff that there was any error in allowing the question put to one of the petitioners on cross-examination.

2. The part of the record of the mayor and aldermen, which related to damages awarded to other parties, was rightly excluded. It was *res inter alios*, and incompetent as an admission by the city.

3. The ruling as to setting off benefits evidently had reference only to the order of 1874, under which the petitioners were claiming damages. The only benefits allowed to be set off were those derived from the situation of the petitioners' lands with reference to the street in question, enhancing their value in that regard. Such benefits were direct and special, although other lots upon the same street might be benefited in like manner. *Allen* v. *Charlestown*, 109 Mass. 243. *Hilbourne* v. *Suffolk*, 120 Mass. 393. *Parks* v. *Hampden*, 120 Mass. 395.

Verdict accepted.

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SETH M. MILLIKEN & others *vs.* SARAH A. PRATT.

Worcester. Oct. 4, 1877. — Sept. 12, 1878. ENDICOTT & LORD, JJ., absent.

The validity of a contract, even as regards the capacity of the parties, is generally to be determined by the law of the state in which it is made.

If an inhabitant of this Commonwealth buys goods personally in another state, or orders them by letter mailed here, and they are delivered to a carrier for him there, the contract is made in that state.

A contract of guaranty, signed in this Commonwealth and sent by mail to another state, and assented to and acted on there, for the price of goods sold there, is made in that state.

A contract, made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts, although the contract was made by letter sent from her here to the other party there.

CONTRACT to recover $500 and interest from January 6, 1872. Writ dated June 30, 1875. The case was submitted to the Superior Court on agreed facts, in substance as follows:

The plaintiffs are partners doing business in Portland, Maine, under the firm name of Deering, Milliken & Co. The defendant is and has been since 1850, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

"Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this to be a continuing guaranty. Sarah A. Pratt."

This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post-office in Portland early in February, 1870.

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The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and, if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding $500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to $860.12, upon which he paid $300, leaving a balance due of $560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiffs' store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs by express from Portland to Daniel in Massachusetts, who paid all express charges. The parties were cognizant of the facts.

By a statute of Maine, duly enacted and approved in 1866, it is enacted that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." The statutes and the decisions of the court of Maine may be referred to.

Payment was duly demanded of the defendant before the date of the writ, and was refused by her.

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

W. W. Rice, for the plaintiffs.

W. S. Stearns & J. H. Butler, for the defendant.

GRAY, C. J. The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract. *Scudder* v. *Union National Bank*, 91 U. S. 406. Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own

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citizens abroad in a state the laws of which permit it. *Greenwood* v. *Curtis*, 6 Mass. 358. *M'Intyre* v. *Parks*, 3 Met. 207.

If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states. As was said by Lord Lyndhurst, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison* v. *Mills*, 1 Dow & Cl. 342, 363. So if a person residing in this state signs and transmits, either by a messenger or through the post-office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth. *M'Intyre* v. *Parks*, above cited.

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine. *Orcutt* v. *Nelson*, 1 Gray, 536. *Kline* v. *Baker*, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. *Jordan* v. *Dobbins*, 122 Mass. 168. It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. St. of Maine of 1866, c. 52. *Mayo* v. *Hutchinson*, 57 Maine, 546. The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of

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any third person. Gen. Sts. c. 108, § 3. *Nourse* v. *Henshaw*, 123 Mass. 96. Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, c. 184. *Major* v. *Holmes*, 124 Mass. 108. *Kenworthy* v. *Sawyer*, *ante*, 28.

The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicil, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicil, be deemed capable of making it.

Two cases in the time of Lord Hardwicke have been sometimes supposed to sustain the opposite view. The first is *Ex parte Lewis*, 1 Ves. Sen. 298, decided in the Court of Chancery in 1749, in which a petition, under the St. of 4 Geo. II. c. 10, that a lunatic heir of a mortgagee might be directed to convey to the mortgagor, was granted by Lord Hardwicke, on the ground of "there having been a proceeding before a proper jurisdiction, the Senate of Hamburgh, where he resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the court was obliged to take notice of." But the foreign adjudication was thus taken notice of as competent evidence of the lunacy only; and that the authority of the foreign guardian was not recognized as extending to England is evident from the fact that the conveyance prayed for and ordered was from the lunatic himself. The other is

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Morrison's case, in the House of Lords in 1750, for a long time principally known in England and America by the imperfect and conflicting statements of counsel *arguendo* in *Sill* v. *Worswick*, 1 H. Bl. 677, 682; but in which, as the Scotch books of reports show, the decision really was that a committee, appointed in England, of a lunatic residing there, could not sue in Scotland upon a debt due him, but that, upon obtaining a power of attorney from the lunatic, they might maintain a suit in Scotland in his name; and Lord Hardwicke said that the law would be the same in England — evidently meaning, as appears by his own statement afterwards, that the same rule would prevail in England in the case of a foreigner who had been declared a lunatic, and as such put under guardianship in the country of his domicil. Morison's Dict. Dec. 4595. 1 Cr. & Stew. 454, 459. *Thorne* v. *Watkins*, 2 Ves. Sen. 35, 37. Both those cases, therefore, rightly understood, are in exact accordance with the later decisions, by which it is now settled in Great Britain and in the United States, that the appointment of a guardian of an infant or lunatic in one state or country gives him no authority and has no effect in another, except so far as it may influence the discretion of the courts of the latter, in the exercise of their own independent jurisdiction, to appoint the same person guardian, or to decree the custody of the ward to him. *Ex parte Watkins*, 2 Ves. Sen. 470. *In re Houstoun*, 1 Russ. 312. *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42. *Stuart* v. *Bute*, 9 H. L. Cas. 440; *S. C.* 4 Macq. 1. *Nugent* v. *Vetzera*, L. R. 2 Eq. 704. *Woodworth* v. *Spring*, 4 Allen, 321. Story Confl. § 499.

Lord Eldon, when Chief Justice of the Common Pleas, and Chief Justice Kent and his associates in the Supreme Court of New York, held that the question whether an infant was liable to an action in the courts of his domicil, upon a contract made by him in a foreign country, depended upon the question whether by the law of that country such a contract bound an infant. *Male* v. *Roberts*, 3 Esp. 163. *Thompson* v. *Ketcham*, 8 Johns. 189.

Mr. Westlake, who wrote in 1858, after citing the decision of Lord Eldon, well observed, "That there is not more authority on the subject may be referred to its not having been questioned;" and summed up the law of England thus: "While the English law remains as it is, it must, on principle, be taken as exclud-

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ing, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." "The validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractûs*; that is, not to its particular provisions on the capacity of its domiciled subjects, but in this sense, that, if good where made, the contract will be held good here, and conversely." Westlake's Private International Law, §§ 401, 402, 404.

In a recent case, Lord Romilly, M. R., held that a legacy bequeathed by one domiciled in England to a boy domiciled with his father in Hamburgh, by the law of which boys do not become of age until twenty-two and the father is entitled as guardian to receive a legacy bequeathed to an infant, might be paid to the boy at his coming of age by the law of England, although still a minor by the law of his domicil, and in the meanwhile must be dealt with as an infant's legacy. *In re Hellmann's Will*, L. R. 2 Eq. 363.

The Supreme Court of Louisiana, in two cases which have long been considered leading authorities, strongly asserted the doctrine that a person was bound by a contract which he was capable by the law of the place, though not by the law of his own domicil, of making; as, for instance, in the case of a contract made by a person over twenty-one and under twenty-five years of age, in a state whose laws authorized contracts to be made at twenty-one, whereas by the laws of his domicil he was incapable of contracting under twenty-five. *Baldwin* v. *Gray*, 16 Martin, 192, 193. *Saul* v. *His Creditors*, 17 Martin, 569, 597. The same doctrine was recognized as well settled in *Andrews* v. *His Creditors*, 11 Louisiana, 464, 476.

In other cases of less note in that state, the question of personal capacity was indeed spoken of as governed by the law of the domicil. *Le Breton* v. *Nouchet*, 3 Martin, 60, 70. *Barrera* v. *Alpuente*, 18 Martin, 69, 70. *Garnier* v. *Poydras*, 13 Louisiana, 177, 182. But in none of them was the statement necessary to the decision. In *Le Breton* v. *Nouchet*, the point adjudged was, that where a man and woman domiciled in Louisiana

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(by the law of which the wife retains her separate property) were married, with the intention of returning to Louisiana, in the Mississippi Territory, (where the rule of the common law prevailed, by which the wife's personal property became her husband's,) the law of Louisiana, in which the parties intended to continue to reside, governed their rights in the wife's property; and the further expression of an opinion that the rule would be the same if the parties intended to remain in the Mississippi Territory was purely *obiter dictum*, and can hardly be reconciled with later decisions of the same court. *Gale* v. *Davis*, 4 Martin, 645. *Saul* v. *His Creditors*, 17 Martin, 569. See also *Read* v. *Earle*, 12 Gray, 423. In *Barrera* v. *Alpuente*, the case was discussed in the opinion upon the hypothesis that the capacity to receive a legacy was governed by the law of the domicil; but the same result would have followed from holding that it was governed by the law of the place where the right accrued and was sought to be enforced. In *Garnier* v. *Poydras*, the decision turned on the validity of a power of attorney executed and a judicial authorization given in France, where the husband and wife had always resided.

In *Greenwood* v. *Curtis*, Chief Justice Parsons said, "By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this state; although such contract may not be valid by our laws, or even may be prohibited to our citizens;" and that the Chief Justice considered this rule as extending to questions of capacity is evident from his subsequent illustration of a marriage contracted abroad between persons prohibited to intermarry by the law of their domicil. 6 Mass. 377–379. The validity of such marriages (except in case of polygamy, or of marriages incestuous according to the general opinion of Christendom) has been repeatedly affirmed in this Commonwealth. *Medway* v. *Needham*, 16 Mass. 157. *Sutton* v. *Warren*, 10 Met. 451. *Commonwealth* v. *Lane*, 113 Mass. 458.

The recent decision in *Sottomayor* v. *De Barros*, 3 P. D. 1, by which Lords Justices James, Baggallay and Cotton, without referring to any of the cases that we have cited, and reversing the judgment of Sir Robert Phillimore in 2 P. D. 81, held that a

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marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying except by a Papal dispensation, was therefore null and void in England, is utterly opposed to our law; and consequently the *dictum* of Lord Justice Cotton, "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil," is entitled to little weight here.

It is true that there are reasons of public policy for upholding the validity of marriages, that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested, than in the recognition of the validity of a marriage contracted in another state, which is not authorized by the law of the domicil, and which permanently affects the relations and the rights of two citizens and of others to be born.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, after elaborate consideration of the authorities, arrives at the conclusion that "in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractûs aut actûs*, the law of the place where the contract is made, or the act done;" or as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractûs* is to govern." Story Confl. §§ 103, 241. So Chancellor Kent, although in some passages of the text of his Commentaries he seems to incline to the doctrine of the civilians, yet in the notes afterwards added unequivocally concurs in the conclusion of Mr. Justice Story. 2 Kent Com. 233 note, 458, 459 & note.

In *Pearl* v. *Hansborough*, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contract-

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ing, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicil, though incapable by the law of the place of the contract. *In re Hellmann's Will*, and *Saul* v. *His Creditors*, above cited. But that alternative is not here presented. In *Hill* v. *Pine River Bank*, 45 N. H. 300, the contract was made in the state of the woman's domicil, so that the question before us did not arise and was not considered.

The principal reasons on which continental jurists have maintained that personal laws of the domicil, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they may go, appear to have been that each state has the rightful power of regulating the status and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized states recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicil of the person, the protection extends.

On the other hand, it is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done

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without such delay as would greatly cripple the power of contracting abroad at all.

As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. A state may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. Under the French code, for instance, which enacts that the laws regulating the status and capacity of persons shall bind French subjects, even when living in a foreign country, a French court cannot enforce a contract made by a Frenchman abroad, which he is incapable of making by the law of France. See Westlake, §§ 399, 400.

It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.

But it is not true at the present day that all civilized states recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many states they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

Judgment for the plaintiffs.

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COMMONWEALTH *vs.* HARRY ASHTON.

Suffolk. June 27. — Sept. 3, 1878. COLT & SOULE, JJ., absent.

An indictment, on the Gen. Sts. *c.* 161, § 57, which charges, substantially in the words of the statute, that the defendant fraudulently obtained certain property of A. "by means of a game, device, sleight of hand and trick, by the use of cards and other implements and instruments, a more particular description of which said game, device, sleight of hand, trick, implements, instruments and cards, is to said jurors unknown," is sufficient; and is sustained by proof that the defendant used either cards or any other implement or instrument.

An indictment, on the Gen. Sts. *c.* 161, § 57, charging that the defendant, by means of a game and device, fraudulently obtained of A. "certain moneys, to wit, divers promissory notes, current as money in said Commonwealth," is sustained by proof that the notes obtained by the defendant were bank-bills.

INDICTMENT in two counts. The second count, upon which the defendant was convicted, charged that the defendant, at Boston, on April 7, 1877, "did fraudulently obtain from one Joseph C. Fletcher, by means of a game, device, sleight of hand and trick, by the use of cards and other implements and instruments, a more particular description of which said game, device, sleight of hand, trick, implements, instruments and cards, is to said jurors unknown, certain moneys, to wit, divers promissory notes, current as money in said Commonwealth, of the amount and of the value in all of eight hundred and seventy dollars, a more particular description of which is to said jurors unknown, of the property of him said Fletcher."

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, for the following reasons: "1. That no offence against the law is set forth. 2. That the indictment is utterly wanting in due precision and certainty. 3. That nothing is set forth in the indictment as to what kind of game, device, trick, or sleight of hand, or means by which certain moneys were fraudulently obtained, or by whom the cards, implements or instruments were used, or with what intent the property was obtained. 4. That nothing is set forth therein, bringing the charge within the Gen. Sts. *c.* 161, § 57, or any other specific statute, or indicating any other specific legal charge of crime. 5. That the indictment is uncertain, repugnant, duplex, and otherwise defective and void." *Allen*, J., overruled the motion; and the defendant excepted.

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At the trial, the government introduced evidence tending to prove that the defendant obtained bank-bills by the use of a large piece of pasteboard, on which were drawn a number of squares, numbered and marked, and tickets bearing corresponding numbers.

The defendant asked the judge to rule that the government had failed to prove the charge alleged in the indictment, by reason of a variance, because the property proved to have been obtained consisted of bank-bills, and not promissory notes of any description within the meaning of the statute; because said bank-bills were not money or promissory notes as alleged; and because the government had failed to prove that the bank-bills were obtained by the use of cards and other implements known or unknown to the grand jury. The judge declined so to rule; and instructed the jury that the second count of the indictment would be sustained by proof that the defendant fraudulently obtained bank-bills of Fletcher by a game, by the use of some implement or instrument not known to the grand jury; and that it was not necessary to prove that cards were also used.

The jury returned a verdict of guilty on the second count; and the defendant alleged exceptions.

J. H. Bradley, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The second count of the indictment is under the Gen. Sts. *c.* 161, § 57. It follows substantially the words of the statute, and is sufficient. The general rule is, that where an offence is created by statute, which sets forth with certainty all the elements necessary to constitute the offence intended to be punished, an indictment is sufficient which follows the words of the statute. *Commonwealth* v. *Barrett*, 108 Mass. 302, and cases cited.

The words of this statute import that a person, to be guilty, must play, practise or use some game, device, sleight of hand, pretensions to fortune telling, trick or other means, by the use of cards or other implements or instruments, with the intent to defraud, and thereby fraudulently induce some other person to part with his property. It is not necessary, as the defendant contends, to allege more particularly these facts, because they are included in the allegations of the indictment, following the words

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of the statute. Such allegations would be but repetitions, which would not add to the certainty or precision of the indictment.

It is true that, when it is practicable, it would be proper to describe the game, device, instruments and means by which the defendant fraudulently obtained the property of another; but the allegation in the indictment, that these are unknown to the grand jury, is a sufficient excuse for the want of that particularity of statement which might otherwise be required. *Commonwealth* v. *Webster*, 5 Cush. 295. *Commonwealth* v. *Sawtelle*, 11 Cush. 142.

The exceptions to the ruling of the court that there was no variance between the allegations and the proofs cannot be sustained. The allegation that the defendant obtained of Fletcher "divers promissory notes current as money in said Commonwealth" was satisfied by proof that he obtained bank-bills. *Commonwealth* v. *Butts*, 124 Mass. 449.

The court also correctly ruled that it was not necessary to prove that cards were used by the defendant, but it was sufficient to prove that the defendant fraudulently obtained bank-bills of Fletcher by a game, by the use of some implement or instrument not known to the grand jury. The statute was intended to provide against fraudulently obtaining property of another by any game, device, trick or means, by the use of cards or of any other implement or instrument, and is not, as the defendant contends, limited to the use of any other implement or instrument similar to cards.

Though the allegation is that the defendant used "cards and other implements and instruments," it is sustained by proof that he used either cards or any other implement or instrument. *Commonwealth* v. *Welsh*, 1 Allen, 1. *Commonwealth* v. *Kimball*, 7 Gray, 328.

Exceptions overruled.

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COMMONWEALTH *vs.* HENRY M. FENNO.

Middlesex. November 26, 27, 1877. — October 18, 1878.

An indictment charging that A. "in and upon one B., with a certain dangerous weapon, to wit, with a pistol then and there loaded with powder and a leaden ball, with which dangerous weapon the said A. was then and there armed, feloniously, wilfully and of his malice aforethought did make an assault, with intent the said B. then and there, with the pistol aforesaid, feloniously, wilfully and of his malice aforethought to kill and murder," sufficiently sets forth an assault with a dangerous weapon; and is sustained by proof of an assault by shooting with the pistol.

INDICTMENT charging that the defendant, on November 29, 1876, at Somerville, "in and upon one James B. Hardy, with a certain dangerous weapon, to wit, with a pistol then and there loaded with powder and a leaden ball, with which dangerous weapon the said Henry M. Fenno was then and there armed, feloniously, wilfully and of his malice aforethought did make an assault, with intent the said James B. Hardy then and there, with the pistol aforesaid, feloniously, wilfully and of his malice aforethought to kill and murder."

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, assigning the following reasons therefor: "1. Because it is not alleged therein that the pistol, alleged to be a dangerous weapon, was capped or capable of being discharged. 2. Because there is no averment therein that the defendant aimed said pistol or discharged it at or towards any person. 3. Because the indictment is generally uncertain and void in law." *Putnam*, J., overruled the motion; and the defendant excepted.

At the trial, the government introduced evidence tending to prove that the defendant was armed with a large sized revolving pistol, loaded with powder and ball, which was made to be discharged by means of a hammer striking upon a metallic cartridge containing the powder and ball, the end of which is explosive and ignites the powder which throws out the ball; and that the defendant aimed and discharged the pistol at Hardy, within effective range of a pistol of that size, the bullets passing near the head of Hardy, so that he heard the whiz of one of them, but at such a distance that no assault could have been

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made upon him by striking him with the pistol itself, or by using it in any other way than by discharging it as a firearm.

The defendant requested the judge to rule that the government had failed to prove the charge alleged in the indictment by reason of variance; but the judge refused so to rule, and instructed the jury that the evidence, if they believed it, was evidence of an assault with a pistol upon Hardy.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Bradley, for the defendant. 1. The motion to quash the indictment should have been granted, for the following reasons: Because the indictment does not allege that the pistol was capped or capable of being discharged. 3 Greenl. Ev. § 59, and cases cited. Because it does not allege that the defendant aimed the pistol or discharged it at or towards any person, or used it as a firearm; or so describe the assault as to apprise the defendant of the nature of the offence for which he was to be tried. *Blake* v. *Barnard*, 9 Car. & P. 626. *Regina* v. *Baker*, 1 Car. & K. 254. *Regina* v. *James*, 1 Car. & K. 530. *Commonwealth* v. *Creed*, 8 Gray, 387. *Commonwealth* v. *Lang*, 10 Gray, 11. *Commonwealth* v. *White*, 110 Mass. 407. *Commonwealth* v. *O'Brien*, 119 Mass. 342. *Beasley* v. *State*, 18 Ala. 535. *Trexler* v. *State*, 19 Ala. 21. *Tarver* v. *State*, 43 Ala. 354. *State* v. *Johnston*, 11 Texas, 22. 1 Archbold Crim. Pract. (8th Am. ed.) 909 note. Because it does not appear, from the description of the weapon or its use, that it is a dangerous weapon described in the statute, and the government is as much bound by the description as if a similar specification had been ordered by the court. *Commonwealth* v. *Snelling*, 15 Pick. 321. *Commonwealth* v. *Giles*, 1 Gray, 466. All the material facts and circumstances constituting the offence should have been set forth, that it may appear whether it was under the Gen. Sts. *c.* 160, § 20, or under § 23. *Commonwealth* v. *Strain*, 10 Met. 521. *Johnson* v. *State*, 14 Georgia, 55.

2. The instructions asked for should have been given. The indictment only charges an assault with the pistol used as a club, while the evidence tended to prove an assault by shooting with the pistol.

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W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth. 1. The motion to quash was rightly overruled. The allegation, "the defendant with a certain dangerous weapon, to wit, with a pistol loaded with powder and a leaden bullet, did make an assault," was a sufficient description of the means with which the assault was committed. *Commonwealth* v. *Creed*, 8 Gray, 387. *Commonwealth* v. *O'Brien*, 119 Mass. 342. *State* v. *Chandler*, 24 Misso. 371. *People* v. *English*, 30 Cal. 214. *State* v. *Swann*, 65 No. Car. 330. *State* v. *Croft*, 15 Texas, 575. *Martin* v. *State*, 40 Texas, 19. In no case has it been held that the means are not sufficiently charged, when charged as they are in the case at bar. The allegation, that he committed an assault with a loaded pistol, is as explicit as the usual allegation, that he did beat, wound and strike; and would not have given any more aid to the defendant, if it had been amplified by adding, "and discharged said pistol at said Hardy, and struck at said Hardy with said pistol." It is never necessary to set forth the means with which the defendant intended to effect the murder. *People* v. *Pettit*, 3 Johns. 511. *State* v. *Dent*, 3 Gill & Johns. 8. Dargan, C. J., in *Beasley* v. *State*, 18 Ala. 538, 539, and in *Trexler* v. *State*, 19 Ala. 22.

2. There was no variance. Making an assault with a pistol means either aiming or shooting it at the person assaulted, or attempting to strike him with it. *State* v. *Shepard*, 10 Iowa, 126.

GRAY, C. J. The court is unanimously of opinion that the indictment sufficiently sets forth an assault with a dangerous weapon, and that the motion to quash was therefore rightly overruled; and, in the opinion of a majority of the judges, the accusation is not limited to one of an assault with a pistol used as a club or bludgeon, but may be supported by evidence of using the pistol, in the way in which a loaded pistol is ordinarily used, by pointing and shooting at the person alleged to have been assaulted, and it was therefore rightly held that there was no variance between the indictment and the proof.

Exceptions overruled.

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COMMONWEALTH *vs.* ARTHUR L. BARRY.

Worcester. October 1. — 21, 1878. AMES & SOULE, JJ., absent.

A., in accordance with a preconcerted plan with B., who had a valise checked at a railroad station, entered the baggage room of the station, and presenting a check corresponding with the one on the valise, obtained permission from the baggage master to place a package in the valise. While the attention of the baggage master was called away by B., A. changed the checks on the valise and a trunk, which was standing underneath the valise, and immediately passed out of the room. By means of this substitution of checks, the trunk was carried to a station other than that intended by its owner. B. went on the same train with it, and on arrival at the station received it, took it with him, and rifled it of its contents. *Held*, that A. was guilty of larceny of the trunk and its contents.

INDICTMENT for larceny of a trunk and its contents.

At the trial in the Superior Court, before *Dewey*, J., it was proved that one Kerr, a travelling salesman from New York, had caused the trunk in question to be checked at the Union Station in Worcester, for Hartford, Connecticut, at about half past four in the afternoon of May 11, and had himself taken a train leaving at that time, but, as there was not time to load the trunk, it was retained in the baggage room at Worcester until the departure of the express train leaving Worcester for Hartford at half past ten at night, when it was put upon the cars and arrived at New York early on the morning of May 12, with a New York check upon it; that one Briggs arrived in New York on the same train, and, with a check corresponding with the check on the trunk, obtained the trunk and took it to a hotel; that the trunk was subsequently sent by him to Baltimore, where it was afterwards found by its owner, rifled of its contents; and that Briggs was convicted in New York of the larceny of the trunk and its contents, and was sentenced to the state prison.

There was also evidence tending to show that Briggs, in company with the defendant, was at the Union Station in Worcester on the afternoon and evening of May 11; that Briggs caused a valise to be checked for New York, which was placed by the baggage master on the trunk in question; that the defendant, according to a preconcerted plan between him and Briggs, got over the counter at the window of the baggage room where bag-

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gage is checked, without permission, and asked the baggage master to permit him to place a package in the valise, showing a check for the same; that he was permitted to do this, and, while he was at the valise and trunk, Briggs called the attention of the baggage master to the window by a question, and the defendant changed the checks on the valise and trunk, and at once left the baggage room through a regular exit. This was all the evidence as to what the defendant did to the trunk at the station.

The defendant requested the judge to give the following instructions: "1. On the whole evidence, the jury would not be warranted in finding the defendant guilty. 2. If the jury find that all that the defendant did was, according to a preconcerted plan with some person, to change the checks on the trunk and valise, and that the asportation of the trunk and its contents was done by some other person, they cannot convict of larceny. 3. There is no evidence in the case to warrant the jury in finding that the defendant did anything more than to change the checks on the trunk and valise, having previously arranged with some other person so to do. 4. If the jury find that the defendant arranged with Briggs that the former should change the checks on the trunk and valise, and he did so change the checks, and if, in pursuance of the plan, Briggs accompanied the trunk on the same train to New York, and there received the trunk from the railroad company and rifled it of its contents, and there is no evidence which satisfies the jury that the defendant was present with Briggs in New York, and with him received the trunk, they cannot convict."

The judge refused to give these instructions; but instructed the jury that it was necessary and was sufficient, in order to convict the defendant, that they should be satisfied beyond a reasonable doubt "that the defendant, at the railroad station in Worcester, fraudulently and feloniously took the trunk into his temporary possession and control, and while so having it fraudulently, with the intent to continue to have said trunk under his control, and appropriate it to his own use or the use of himself and confederate, fraudulently and feloniously took off the Hartford check from the same, which the railroad company had placed on it, the owner having a corresponding check, and placed thereon a check of the company for New York, whereof he held

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a corresponding check which would entitle him to have the trunk transported to New York, and to receive the trunk in New York of the company on its arrival there, and the trunk was carried to New York as the trunk of the defendant, or of which he was entitled to the possession and control, and, by reason of the changed check thereon, the trunk with its contents were, on its arrival at New York, delivered to the defendant or to some person for him."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. S. B. Hopkins, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

LORD, J. We do not understand that the presiding justice intended, by the language used, to instruct the jury that the temporary possession referred to in the instructions was, in itself, an asportation. It does not appear that the question, whether there was an asportation at or before the changing of the checks, was raised at the trial, or that the attention of the court was called to that subject. An asportation at that precise time was unimportant. The real question was, whether the defendant then, feloniously and with intent to steal, set in motion an innocent agency, by which the trunk and contents were to be removed from the possession of the true owner, and put into the defendant's possession, and by means of such agency effected the purpose; and the temporary possession and control, to which the court referred, must be understood to mean such possession and control as enabled the defendant to execute the device by which, through such innocent instrumentality, he should become possessed of the property.

There was evidence tending to show that the defendant and Briggs were acting in pursuance of a common purpose, and that the acts of each were the acts of both; and, inasmuch as no question was raised upon this subject, it is taken to be true, that what one did was the act of both, and that the subsequent actual possession of the trunk by Briggs was the possession of the defendant. It will be seen, therefore, that, by the instructions of the presiding judge, the jury were authorized to find the defendant guilty of larceny, if, in the mode stated, he or his confederate in action obtained possession of the trunk and its contents,

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This, as we understand, has been the law from the earliest period: "There is no occasion that the carrying away be by the hand of the party accused, for if he procured an innocent agent to take the property," by means of which he became possessed of it, "he will himself be a principal offender." 3 Chit. Crim. Law, 925. It is held to be a larceny "if a person, intending to steal my horse, take out a replevin, and thereby have the horse delivered to him by the sheriff; or if one, intending to rifle my goods, get possession from the sheriff, by virtue of a judgment obtained without any, the least color or title, upon false affidavits, &c., in which cases, the making use of legal process is so far from extenuating, that it highly aggravates the offence, by the abuse put on the law, in making it serve the purposes of oppression and injustice." 1 Hawk. *c.* 33, § 12. 1 Hale P. C. 507. *Chissers' case*, T. Raym. 275. *Wilkins' case*, cited in 1 Hawk. *c.* 33, § 22; *S. C.* 1 Leach, (4th ed.) 520. It will thus be seen that an asportation may be effected by means of innocent human agency, as well as by mechanical agency, or by the offender's own hand.

The case has been argued as if it was intended by the presiding justice to rule that the jury must find that, at the instant of the exchange of the checks, there was such an actual manual change in the possession as of itself to be an asportation. We do not so understand the instruction. An asportation at that time was unimportant. The real question was, whether the defendant at that time, feloniously and with intent to steal, set in motion an innocent agency, by which the trunk and contents were to be removed from the possession of the true owner, and put into the defendant's possession, and whether such purpose was actually accomplished. If, before the trunk had been started, the scheme had been detected, the offence of the defendant would have been an attempt to commit larceny, and doing an act towards the commission of it, but failing in the perpetration; but, as soon as the asportation was complete, for however short a distance, the offence of larceny was committed, such asportation having been caused by him, by fraudulent means, and through an innocent agent, unconscious of what, in fact, he was doing. As soon as the trunk was placed on board the cars, checked, with the corresponding check in the possession of the

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defendant or his confederate, the trunk and its contents were in the possession and control of the defendant or his confederate, and it is immaterial of which. Nor is the time when the actual manual possession came into the hands of the parties important, they having all the time the constructive possession and the real control of it.

The instructions prayed for by the defendant's counsel were properly refused, because they wholly omitted all reference to the purpose and intent of the defendant in what he did, and all reference to the fact that the defendant was an accomplice of Briggs, or that the actual subsequent possession by Briggs was, or might be, the possession of the defendant. The request to instruct the jury that, upon the whole evidence, they would not be warranted in finding the defendant guilty, was also properly refused. *Exceptions overruled.*

COMMONWEALTH *vs.* OWEN MARTIN.

Plymouth. Oct. 15. — 28, 1878. AMES & ENDICOTT, JJ., absent.

In an indictment for manslaughter, an averment that the defendant committed the crime "in some way and manner, and by some means, instruments and weapons to the jurors unknown," is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death.

If an indictment charges the defendant in one count with killing by a certain weapon, and in another count with killing by means and instruments to the grand jurors unknown, and at the trial the killing by the defendant is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count.

INDICTMENT, in two counts, for manslaughter. The first count charged that the defendant, at Brockton, on May 5, 1878, made an assault upon Jeremiah Kelleher with a hammer, causing the death of Kelleher. The second count alleged that the killing was caused by the defendant "in some way and manner, and by some means, instruments and weapons to the jurors unknown."

At the trial in the Superior Court, before *Brigham*, C. J., the government introduced evidence tending to show that Kelleher's death was caused by a blow upon the head with a hammer, or with some other weapon or instrument unknown, in the defend-

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ant's saloon, when the defendant with other persons was present; and that no one except the defendant was in a situation to do the injury. All the witnesses who testified for the Commonwealth at the trial had also testified before the grand jury which found this indictment, upon the same matter.

The defendant introduced evidence tending to show that the wound of which Kelleher died resulted from falling upon the floor, or striking against the counter while falling; that such falling was caused by a push given him by the defendant to prevent him from falling backward against the counter, and to save the counter from destruction, and to prevent Kelleher from being injured by so falling; and that no more force was used than was necessary to accomplish such purpose.

The defendant asked the judge to rule that, upon the evidence, the jury must be satisfied beyond a reasonable doubt that Kelleher was killed by a blow, or they must return a verdict of not guilty; that the jury, upon the evidence, must return a verdict of not guilty, upon the second count; and that there was a variance between the allegations in the second count and the evidence, and, for that reason, the jury must return a verdict of not guilty on the second count.

The judge declined so to rule, but instructed the jury as follows: "To convict the defendant, there must be evidence, beyond a reasonable doubt, that the defendant did some act of violence to the person of the deceased, which act was neither excusable nor justifiable, and caused the death of the deceased; that if such act of violence was done by the defendant, in the protection of his person or his property, when either was in danger of harm from the deceased, and for the purpose of repelling such harm, and such act was necessary and reasonable for that purpose, the defendant would not be responsible, under this indictment, for such act of violence, although it caused the death of the deceased; that if the jury were not convinced beyond a reasonable doubt that the defendant's acts of violence to the deceased were done without excuse or justification, by means of a hammer, and thus caused the death of the deceased, the defendant must be acquitted upon the first count of the indictment; that, failing to find the first count of the indictment proved, as required by law, the jury might find the defendant guilty on the

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second count, if the circumstances under which the deceased received the injury which caused his death admitted of no reasonable explanation, excepting that that injury was caused in the defendant's saloon, and by the defendant using some means, weapons or instruments for that purpose, of the precise character and description of which the trial offered no evidence, provided the defendant's use of such means, weapons or instruments was unnecessary or unreasonable for the protection of his person or property."

The jury returned a verdict of not guilty on the first count, and of guilty on the second count; and the defendant alleged exceptions.

H. Kingman, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The second count is sufficient, being substantially like that the validity of which was affirmed in *Commonwealth* v. *Webster*, 5 Cush. 295, 323. The evidence at the trial was conflicting as to the manner and means of death, and it does not appear but that there was other evidence before the grand jury. The Chief Justice of the Superior Court therefore rightly refused to rule that the second count was not supported by the evidence; and his instructions to the jury were sufficiently favorable to the defendant. When an indictment charges the defendant in one count with killing by a certain weapon, and in another count with killing by means and instruments to the grand jurors unknown, and at the trial the killing by the defendant is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the second count. *Commonwealth* v. *Tompson*, 2 Cush. 551. *Commonwealth* v. *Thornton*, 14 Gray, 41. *Commonwealth* v. *Glover*, 111 Mass. 395, 401. The objection, made in argument, that the instructions given covered only the means, weapons or instruments by which, and not the way or manner in which, the killing was done, does not appear to have been suggested at the trial and is not open to the defendant. *Exceptions overruled.*

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COMMONWEALTH *vs.* PATRICK McKENNA.

Bristol. October 22. — 28, 1878. ENDICOTT & LORD, JJ., absent.

If a person, on arraignment, refuses to plead, and stands mute, he is, by the Gen. Sts. *c.* 171, § 29, to be tried as if he had pleaded not guilty; and, having been so tried, and been convicted, and having appealed, the want of a formal entry of such a plea upon the record transmitted to the appellate court is no error; and a statement by the clerk to the jury, when the defendant is put upon his trial in that court, that he had pleaded not guilty in the court below, is at the most an informality which is waived by going to trial without objection.

COMPLAINT to the First District Court of Bristol for an unlawful sale of intoxicating liquor. The record of the District Court, after setting forth the complaint, and the bringing in of the defendant to answer to the same, proceeded as follows: "Which complaint being read to the defendant, and he being asked by the court whether he is guilty or not guilty of the offence therein charged, stands mute. And now, after a full hearing and examination in said case, it appears to said court that said Patrick McKenna is guilty. It is therefore considered and ordered by the court" that he pay a fine of fifty dollars and costs; from which sentence he appealed to the Superior Court, and entered into a recognizance to prosecute his appeal.

When the defendant was put upon his trial in the Superior Court, the clerk read the complaint to the jury, and made the usual announcement to them, as follows: "To which complaint the defendant in the court below pleaded and said that thereof he was not guilty, and now for trial puts himself upon the country, which country you are. If he is guilty, you will say so. If he is not guilty, you will say so, and no more." To this statement of the clerk no objection was then made by the defendant or his counsel; and, upon the trial, the jury returned a verdict of guilty.

The defendant moved to set aside the verdict, and also moved in arrest of judgment, because no plea was entered, and no issue joined or ordered, in either court, and because the defendant was not arraigned or called upon to plead in the Superior Court. *Bacon*, J., overruled both motion; and the defendant alleged exceptions.

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J. Brown, for the defendant, cited Gen. Sts. *c.* 171, § 29; Whart. Crim. Law, § 530; *State* v. *Saunders*, 53 Misso. 234; *Wilbur* v. *Ripley*, 124 Mass. 468.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The record shows that in the District Court the defendant, being duly arraigned, stood mute, and upon a full hearing was found guilty. The statute provides that, if, on arraignment, a person refuses to plead, "the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty." Gen. Sts. *c.* 171, § 29. The defendant, having had full opportunity to plead in the District Court, and having refused to do so, was by this statute to be tried as if he had pleaded not guilty; and having been so tried, the want of a formal entry of such a plea upon the record did not prejudice him and was no error. *Ellenwood* v. *Commonwealth*, 10 Met. 222. *Harris's case*, Cro. Jac. 502. The announcement by the clerk to the jury in the Superior Court was according to the legal effect of the proceedings below, and his statement that the defendant had pleaded not guilty was, at the most, an informality that was waived by going to trial. *Commonwealth* v. *McCauley*, 105 Mass. 69.

Exceptions overruled.

MARIA DODD *vs.* HENRY N. ADAMS.

Berkshire. Sept. 10. — Oct. 21, 1878. AMES & SOULE, JJ., absent.

If a husband conveys land to his wife with a design to hinder, delay and defraud his creditors, and the wife participates in such design, the hay cut on the land is liable to be taken on execution to satisfy the debt of a creditor of the husband, contracted subsequently to the conveyance.

TORT for the conversion of eight tons of hay. The defendant, a deputy sheriff, justified by reason of the taking of the hay, as the property of Thomas Dodd, the plaintiff's husband, on a writ of execution issued by a district court in favor of one Church. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, the material parts of which appear in the opinion.

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J. Branning, for the plaintiff.

J. Dewey, for the defendant.

LORD, J. In this case the plaintiff's counsel requested the court to instruct the jury that "although the jury should find that the conveyance of the real estate by the husband for a valuable consideration, through the intervention of a third person to his wife, the plaintiff, it would not render the hay, cut on such real estate by the plaintiff, and put into her barn, liable to attachment and sale on execution by a subsequent creditor of her husband." The defendant's counsel makes the point that "the instruction asked by the plaintiff, by mistake or otherwise, is not intelligible, and for this reason, if for no other, was properly refused." We think, however, that such criticism of the language of the prayer should not be sustained. The intention of the party is quite apparent. He has used the word "although" instead of "if," and has omitted the verb "was" before the preposition "for." These changes being made, the request would read, "that if the jury should find that the conveyance of the real estate by the husband was for a valuable consideration, through the intervention of a third person, to his wife, the plaintiff, it would not render the hay, cut on said real estate by the plaintiff, and put into her barn, liable to attachment and sale on execution by a subsequent creditor of her husband." And this we do not doubt was the request intended, and understood to be made at the time.

It was, however, properly refused; for it omits an element which the Chief Justice of the Superior Court deemed proper, and which we have no doubt was a legal and necessary qualification of the prayer. That qualification the Chief Justice rightly gave in this language: "If the jury should find from the evidence that said Thomas Dodd made said conveyance to his wife, the plaintiff, with a design to hinder, delay and defraud his creditors, and his wife participated in that design, then she could not hold hay, cut from said thirty acres, against subsequent creditors of her husband, and the same was liable to be taken to satisfy the execution of said Church, in the hands of the defendant." The ruling requested, thus modified, was given, and was in all respects accurate, and in conformity with the many and uniform decisions of this court. *Exceptions overruled.*

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QUINTUS ALLEN *vs.* HARDING G. WOODARD.

Franklin. Sept. 17. — Oct. 21, 1878. ENDICOTT & SOULE, JJ., absent.

A mortgage of a parcel of land to the grantee and his heirs, describing it by metes and bounds, "with the factory buildings standing thereon, with the water-wheel, shafting, belting, machinery, tools and fixtures, contained in said buildings," and containing the usual covenants and habendum, is a mortgage of real estate only.

A payee of a promissory note, signed by a principal and surety, and secured by a mortgage of land from the principal, may maintain an action on the note against the surety, without first exhausting the security.

CONTRACT on a promissory note payable to the order of the plaintiff, and signed by James M. Munson and the defendant.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, so much of which as is necessary to the understanding of the points decided appears in the opinion.

G. M. Stearns & C. C. Conant, for the plaintiff.

A. De Wolf, (*D. Aiken* with him,) for the defendant.

LORD, J. Two questions have been argued in this case. The first is, it being agreed that the defendant was known by the plaintiff to have signed the note in suit as surety for one Munson, whether the plaintiff had not by his own neglect permitted certain securities, given by Munson to him at the inception of the note, to be so lost and rendered unavailable to himself or to the defendant, as surety for Munson, as to entitle the defendant to have deducted from the amount of his liability the value of such securities so said to be lost.

The ground upon which the defendant bases his claim is this: Munson gave to the plaintiff, as additional security, a mortgage of a parcel of land, describing it by metes and bounds, "containing about six acres, more or less, with the factory buildings standing thereon, with the water-wheel, shafting, belting, machinery, tools and fixtures, contained in said buildings, to have and to hold to him, his heirs and assigns." This mortgage was duly recorded in the registry of deeds, and nowhere else. The defendant contends that it was a mortgage of personal property as well as of real estate, and should have been recorded in the office of the clerk of the town, as a mortgage of personal property; that the personal property referred to in the mortgage was

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subsequently mortgaged to another party as personal property; and that such mortgage was properly recorded, and the mortgagee was entitled to, and did sell such personal property, by means of which the defendant was deprived of the benefit of it in the reduction of his note; and that, if he pays the note, he cannot now be subrogated to the rights of the plaintiff in such property.

The question, therefore, first presented is, whether or not this instrument is a mortgage of personal property. To determine this, it is proper to look at the entire contents of the instrument. Taking the entire instrument, it will be seen that in form and substance it is a mortgage of real estate, that it is a grant to the grantee and his heirs, and that it contains covenants, not personal only, but covenants which run with the land, with the usual habendum in conveyances of real estate. So far, therefore, as the form is concerned, it is that of a deed of real estate. It becomes necessary, then, to inquire whether there is any language in the instrument which indicates that the parties intended to make the instrument an instrument of conveyance of personal property, in addition to the plain, obvious and primary purpose of a conveyance of real estate in mortgage.

In order to determine this question correctly, it is necessary to look with care at the precise language used, that we may see whether it is the natural and apt language to describe all such property as passes with the land, or whether it is intended to incorporate into the well known form of conveyance another new and substantial contract between the parties, of a different character. The words used are, "with the factory buildings thereon standing, with the water-wheel, shafting, belting, machinery, tools and fixtures, contained in said building." There is no word used in this description which may not of itself, taken alone, describe personal estate. But in the connection in which used, it would be scarcely less than absurd to say that the word "buildings" was a description of personal chattels; and the same is true of the word "fixtures," which are the first and the last words used in the description of articles claimed to be personal property. Some of the other words used may, in their ordinary signification, when standing alone, be descriptive of personal property; but it would be an extraordinary use of lan-

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guage to speak of a "factory building with the water-wheel" as personal property. "Shafting," possibly, and "belting," "machinery," and "tools," if used without reference to their position, might convey the idea that they were chattels; but while, taken independently, and without any relation to their situation, they might so be deemed chattels, yet every one of the words is a word which may properly be used to signify a part of the realty, as well as the words "buildings," "water-wheel," and "fixtures." The term "fixture" has a meaning which is well understood between grantor and grantee, which is different from its meaning as used between lessor and lessee. We are, therefore, to take the entire instrument together, and determine from its terms what property passed by the deed between the parties. And we are satisfied that the parties intended to convey, and did convey, only such articles as were a part of, or attached to, the realty, and which, from their situation and use, would be deemed to be, as between grantor and grantee, connected with the realty. We have no doubt that "shafting," "belting," "machinery," and "tools," can be so attached to, and be a part of the realty, when, by the connection in which they are used, such is shown to be the purpose and intention of the parties. We have no description of the articles named, nor how they were connected with, or attached to, the realty; and, in the absence of all evidence upon that subject, and taking into view the instrument in which they are used, and the manner in which they are introduced into that instrument, we think that the whole instrument, taken together, is simply a conveyance of real estate, with all such fixtures as, between grantor and grantee, might pass as parcel of the realty; that it neither conveys, nor purports to convey, any of those instruments which are used by the hand, and which are not in any sense connected with the realty.

In this view of the case, the instrument is in no sense a chattel mortgage, but simply a mortgage of the realty, with such articles as are attached to it in such manner as to be properly fixtures. It follows, of course, that it was neither the duty of the mortgagee to cause the instrument to be recorded as a chattel mortgage, nor would it have been proper for him, upon any facts shown in the case, so to do. There was, therefore, no negligence on the part of the plaintiff, by which the defendant lost any right.

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The other question relates to the land mortgaged. At the time the mortgage was given, there was an outstanding power-of-sale mortgage, executed by Munson on April 10, 1866, to one Felton. That mortgage was assigned to the plaintiff after the mortgage before referred to was made to him. And, as the facts find, he sold the mortgaged property in accordance with the power of sale, for the amount due on the mortgage note, and the expenses of sale.

It is agreed that the description of the land in the mortgage deed to Felton, which refers to and adopts the description of the land in a mortgage from Munson to Metcalf, recorded in the registry of deeds, "to which reference is hereby made for description," is erroneous, by reason of the omission of one of the courses; and that the description cannot be applied to the land.

It is not necessary for us to determine whether, taking the entire description together, there is not sufficient to identify the premises intended to be conveyed. Nor is it necessary to determine whether such deed might, by proper proceedings, be reformed, so as to express the real contract of the parties; nor to determine whether it is absolutely void. If, in the mortgage to the plaintiff, there was described any land which was not described in the mortgage to Felton, and which this plaintiff would be entitled to hold notwithstanding that mortgage, or if the mortgage to Felton was absolutely void, so that the plaintiff took the whole title to the land under his mortgage, or a title to a portion of it not covered by the mortgage to Felton, the land still remains, and, without regard to his security upon that land, the plaintiff has the right to demand payment of his note of the defendant. If there is collateral security in whole or in part, which may properly be applied to the payment of the note in suit, the right of the defendant to be subrogated to the rights of the plaintiff, in relation to such security, is in no manner affected by the decision of this suit.

The result, therefore, is that the plaintiff is entitled to recover the full amount of the note, and it is for the defendant to determine whether, in law or in equity, he has any rights which may be made available to him under the mortgage to the plaintiff.

Judgment for the plaintiff.

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ALFREDA B. ALDRICH, administratrix, *vs.* SPRINGFIELD, ATHOL AND NORTH EASTERN RAILROAD COMPANY.

Hampshire. Sept. 25. — Oct 2, 1878. AMES & SOULE, JJ., absent.

A judge of the Superior Court has no authority, under the Gen. Sts. *c.* 115, § 6, at the hearing of a motion for a new trial, to report for the determination of this court a question of law which might have been and was not raised before verdict.

At a trial in the Superior Court the plaintiff had a verdict, and the defendant alleged exceptions to a ruling of the judge upon a piece of evidence, and afterwards moved to set aside the verdict as against evidence and the weight of evidence. The judge, as he stated in his report, overruled this motion for the purpose of reporting the case to this court, and, after reciting the whole evidence as well as the particular exception, concluded his report as follows: "If upon the evidence the action cannot be maintained, or if the exception taken by the defendant is sustained, then the verdict is to be set aside; otherwise, the verdict is to stand." *Held*, that the judge, not having been asked at the trial to rule upon the whole evidence, was not authorized to report to this court the question whether upon the whole evidence the action could be maintained; and that the order overruling this motion should be set aside, and the motion stand for further hearing in the Superior Court.

GRAY, C. J. This is an action of tort by the administratrix of Nelson Aldrich, to recover for injuries sustained by him, while employed as a brakeman upon a passenger train on the defendant's railroad, by reason of the alleged negligence of the defendant in running that train by a flying switch over a side track, and in leaving a freight train on that track.

At the trial in the Superior Court, certain rules of the defendant's superintendent were introduced in evidence, by one of which "all passenger trains must come to a full stop at all stations before detaching any part of the train." No exception was taken to any ruling or instruction at the trial, until after the judge had finished his charge to the jury, when the plaintiff's counsel rose and said that these rules were evidence for the jury to consider upon the question of what the corporation considered a want of due care on its part. The judge answered, "Yes, if the corporation knew of the rules made by the superintendent and sanctioned them." To this answer the defendant objected and excepted, and the exception was reserved.

After verdict for the plaintiff, the defendant filed a motion to set it aside as against the evidence and the weight of evidence. This motion the judge, as he states in his report, "overruled for the purpose of reporting the case to the Supreme Judicial Court."

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The report recites all the evidence introduced at the trial, the exception above stated, the verdict, the motion to set it aside, the overruling of this motion as aforesaid, and concludes as follows: "If, upon the evidence, the action cannot be maintained, or if the exception taken by the defendant is sustained, then the verdict is to be set aside; otherwise, the verdict is to stand."

At the suggestion of the court, an argument has been had upon the question whether a judge of the Superior Court has authority, upon the hearing of a motion for a new trial, to report for the determination of this court a question of law which might have been and was not raised before the verdict. It is contended that he has such authority under the Gen. Sts. *c.* 115, § 6, which authorize him, at any time before judgment in a civil action, to set aside the verdict and grant a new trial, for any cause for which a new trial may by law be granted; or, after verdict, to report the case for determination by this court.

But this section, like that clause of the section next following, which provides that, on motions for a new trial, a party aggrieved by an opinion, ruling, direction or judgment of the court in matters of law, may allege exceptions thereto, is not intended to allow a party to present as matters of law, upon a motion for a new trial, all the matters of law which arose or might have arisen during the trial, and upon which no question of law was then made or reserved. A demurrer to evidence cannot be taken after verdict. If a case has been tried and a verdict rendered, under rulings and instructions in matter of law, not objected to, a motion for a new trial is addressed exclusively to the discretion of the presiding judge; and neither the party moving, nor the judge to whom the motion is made, can invoke the decision of this court upon any question involved in the exercise of that discretion, and which the party is not, at that stage of the case, entitled to present as a question of law. The presiding judge, therefore, not having been asked at the trial to rule upon the legal effect of the whole evidence, was not obliged or authorized to report the evidence for the purpose of raising such a question after verdict. *Lowell Gas Light Co.* v. *Bean*, 1 Allen, 274. *Phillips* v. *Soule*, 6 Allen, 150. *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159, 166. *Whittaker* v. *West Boylston*, 97 Mass. 273. *McAllister* v. *Burrill*, 98 Mass. 334.

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The learned judge appears not to have applied his judicial discretion to the decision of the motion for a new trial, but to have overruled that motion *pro forma*, and for the purpose of reporting to this court the question whether the action can be maintained, and by the terms of his report has made the decision of that question in the affirmative by this court essential to the maintenance of the verdict. As, for the reason already stated, this court has no jurisdiction to determine that question, justice requires that the order overruling that motion be set aside, and the motion stand for further hearing in the court below. The result of that hearing may render the narrower question of the effect of the rules immaterial, and the expression of any opinion upon this question is therefore reserved until the motion for a new trial shall have been

Further heard in the Superior Court.

D. W. Bond, for the defendant.

C. Delano, for the plaintiff.

SIMON F. COOLEY *vs.* ENOS E. COOK.
WILLIAM P. PORTER *vs.* SUPLIEN CHARETTE.

Hampshire. Sept. 18. — Oct. 21, 1878. ENDICOTT & SOULE, JJ., absent.

Under the U. S. Rev. Sts. § 5013, the four months next preceding the commencement of proceedings in bankruptcy, an attachment made within which is dissolved by § 5044, are to be reckoned exclusive of the first day, and, if the last day falls on Sunday, exclusive of that also.

An assignee in bankruptcy, after demand and refusal, may maintain an action of tort, in the nature of trover, against an officer holding goods of the bankrupt under an attachment on mesne process which has been dissolved by the assignment in bankruptcy, without first applying to the court from which the process issued for an order to deliver the goods to him.

PORTER sued Charette in the Superior Court in an action of contract, and upon the writ in that case an attachment of the defendant's goods was made by Cook, as deputy sheriff, on Saturday, February 10, 1877, at 1 P. M.

On Monday, June 11, 1877, at 12 M., Charette filed his petition in bankruptcy. Cooley was afterwards appointed his as-

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signee, and received an assignment of his property from the register in bankruptcy, and, after making a demand on Cook for the goods held by him under the attachment, and his refusal to deliver them, brought an action of tort in the nature of trover against him in the Superior Court.

At the trial of this action of tort, *Aldrich*, J., ruled that, as no previous application had been made in the other action for a dissolution of the attachment, and no order obtained from the court to Cook for a delivery of the property to the assignee in bankruptcy, the latter could not recover in this action, and directed a verdict for the defendant, which was returned; and the plaintiff alleged exceptions.

In the action of contract brought by Porter against Charette, the defendant's bankruptcy having been suggested on the record, and it being admitted that there was no other defence, his assignee in bankruptcy then came in and moved that the attachment should be dissolved, as having been made within four months next preceding the filing of the petition in bankruptcy. The plaintiff opposed this motion, and moved for a special judgment against the property attached. The question presented by these motions was submitted, upon an agreed statement of the facts above recited, to the determination of the Superior Court, which gave judgment for the assignee and against the plaintiff; and the plaintiff appealed to this court.

H. H. Bond, for the assignee in bankruptcy.

C. Delano, contra.

GRAY, C. J. By the U. S. Rev. Sts. § 5044, an assignment in bankruptcy dissolves any attachment of the bankrupt's property, "made within four months next preceding the commencement of the bankruptcy proceedings;" and it is settled that the computation of the four months is not to be made exclusively both of the day of the attachment and of the day of the filing of the petition in bankruptcy; or, in other words, that an attachment, made on the day whose number in the month corresponds to that of the day on which the petition is filed, is within this section. *Dutcher* v. *Wright*, 94 U. S. 553. *Richards* v. *Clark*, 124 Mass. 491.

In the case at bar, computing the four months according to the rule so established, whether we reckon forwards from the

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day of the attachment, or backwards from the day of the commencement of the proceedings in bankruptcy, the last day of the four months falls on a Sunday, and the question is, whether, for that reason, another day is to be included in the computation.

Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest. *Alderman* v. *Phelps*, 15 Mass. 225. *Thayer* v. *Felt*, 4 Pick. 354. *Ex parte Dodge*, 7 Cowen, 147. *Rowberry* v. *Morgan*, 9 Exch. 730.

The determination of the question before us therefore depends upon the true construction of the last clause of the U. S. Rev. Sts. § 5013. This section, after defining the meaning of various words used in the title Bankruptcy in these statutes, provides as follows: "And in all cases in which any particular number of days is prescribed by this title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also."

The bankrupt act, in several places, measures time by days; §§ 4981, 4982, 5021, 5024, 5032, 5036, 5056, 5102; in a greater number of places by months; §§ 5014, 5023, 5044, 5054, 5092, 5093, 5101, 5110, 5128, 5129, 5132; in a few instances by years; §§ 5057, 5120, 5132; and in one section by each of the three, as follows: "At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts.' § 5108.

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It can hardly be presumed that Congress, in laying down general rules of definition and interpretation, especially as to the computation of time, intended them to be inapplicable to the majority of instances in which periods of time are mentioned in the bankrupt act. The more reasonable conclusion is that the intention was to establish a general rule of interpretation, by which all periods of time prescribed in that act might be computed.

The cases in the federal courts support this view. In *Lang's case*, 2 Bankr. Reg. 480, Judge Lowell held that, when the last day of the year from the adjudication of bankruptcy, within which the bankrupt might apply to the court for a discharge, fell on a Thanksgiving day appointed by the President, he might make his application on the next day. And in *Dutcher* v. *Wright*, above cited, the opinion and decision of the Supreme Court, excluding the day of the filing of the petition in the computation of four months, under § 5128, in the case of a fraudulent preference, were largely based upon § 5013. 94 U. S. 559, 561. And see St. 32 & 33 Vict. *c.* 71, § 114; *Ex parte Ferrige*, L. R. 20 Eq. 289.

The assignment in bankruptcy therefore dissolved the attachment, vested the title in the goods attached in the assignee, and was conclusive evidence of his right to take, hold, sue for and recover them. U. S. Rev. Sts. §§ 5044, 5049. He could not indeed have maintained an action of replevin or of detinue in a federal court to recover the goods specifically, so long as they were held by the sheriff under the attachment from a state court. *Freeman* v. *Howe*, 24 How. 450. *Johnson* v. *Bishop*, 1 Woolw. 324. But, after demand and refusal, he was clearly entitled to maintain an action of tort, in the nature of trover, against the attaching officer, to recover damages for the illegal withholding of the goods, and was not obliged to apply to the court, in which the attachment was made, to order the goods to be delivered to him. *Buck* v. *Colbath*, 3 Wall. 334. *Penniman* v. *Freeman*, 3 Gray, 245, 247.

The result of the whole matter is, that in the action of contract the attaching creditor is not entitled to a special judgment against the property attached, and the

Judgment is affirmed;

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and that in the action of tort the ruling that the assignee could not recover against the attaching officer was erroneous, and the *Exceptions are sustained.*

MELISSA BROWN *vs.* MARSHALL W. FRENCH.

Hampden. Sept. 24. — Oct. 3, 1878. AMES & SOULE, JJ., absent.

A testator, by his will, directed his executors to "use their own judgment as to investing the moneys arising from my estate; at the same time I would recommend to them the propriety of keeping at least one half of the same invested on mortgage of unincumbered real estate, as I think well of that kind of security." When a trustee of the estate was afterwards appointed, more than half of the trust fund was invested in United States bonds, and none of it in mortgages of real estate. The trustee, who had had experience in making investments for himself and others, including banks in which he was an officer, sold the United States bonds, and invested the greater part of the proceeds in railroad bonds at eighty-five per cent. of their par value, and in a promissory note of an individual secured by pledge of twice its amount of such bonds, after having advised with various persons reputed of good judgment in financial matters, and after having himself made careful inquiries and investigations, the result of which was to satisfy his mind that the investments were safe and prudent ones at the time, and were proper for him to make in his capacity as trustee. The bonds were payable in gold in twenty years, or at the option of the obligor after five years, with interest coupons attached payable semiannually in gold at six per cent., and were secured by a first mortgage upon the franchises and property of three railroad corporations out of this Commonwealth, the whole of whose stock had been actually paid in, in cash, and was equal in amount to the whole of the bonds which had been sold by the trustees to which they were originally issued, and whose roads formed part of a continuous and direct line from Portland in the State of Maine to Ogdensburg in the State of New York, and formed a line of one hundred and twenty-five miles in the State of Vermont, half of which was already complete and in operation, and the rest of which was in the course of completion under very favorable contracts. At the time of the investment, the roads were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability; and the bonds were selling in the market at from eighty to ninety per cent. of their par value, and were regarded as a first class investment, and were purchased by persons of reputed good judgment for permanent investment. The bonds subsequently depreciated greatly in value. *Held*, that the trustee acted with the sound discretion that the law required of him, and should not be charged with the loss.

APPEAL from a decree of the Probate Court, allowing the account of Marshall W. French as trustee under the will of James

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Dimmick. Hearing before *Ames*, J., who reported the case for the consideration of the full court as follows:

The appellant objected to two investments allowed by the Probate Court, one of $14,100 invested in Portland and Ogdensburg Railroad bonds, and one of $5500 invested in the promissory note of H. Fairbanks, chairman, secured by such bonds pledged as collateral security to twice the amount of the note.

The will of James Dimmick, dated July 12, 1858, contained the following clause: "I order that my executors use their own judgment as to investing the moneys arising from my estate; at the same time I would recommend to them the propriety of keeping at least one half of the same invested on mortgage of unincumbered real estate, as I think well of that kind of security." At the time of the appointment of French as trustee, the trust estate amounted to $40,605.90 personal estate, and $2580 real estate; and at that time the personal estate was invested in sundry stocks and personal securities, $25,500 being invested in United States bonds, $1000 in state bonds, $13,000 in various city bonds, and no part of it being invested in mortgages of real estate.

In January, 1870, the trustee exchanged $1500 of United States bonds for six per cent. Pacific Railroad bonds. In June, 1871, he sold $13,000 of the United States bonds for cash at $112⅜, and during the same month he sold $1000 more of the same at $112⅝ for cash. In April, 1872, he invested $2000 in the Portland and Ogdensburg Railroad bonds. In the summer and fall of 1872, some of the government bonds of the same issue as those held by the trustee were called in for redemption, and the trustee, apprehending that the rest would be called for soon, in November, 1872, sold $10,000 of the United States bonds for cash at $114⅛ and invested the proceeds in Portland and Ogdensburg Railroad bonds.

These bonds were the joint promises to pay of three railroad corporations organized in the State of Vermont, namely, the Essex County, the St. Johnsbury and Montpelier, and the Lamoille Valley, which were built and operated under one management, and extended in a continuous line from Lunenburg upon the Connecticut River to Swanton upon Lake Champlain, and together constituted what was called the Vermont division of the

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Portland and Ogdensburg Railroad, a line made up of different corporations extending from Portland in the State of Maine to Ogdensburg in the State of New York. The bonds were sometimes, and more properly, called the joint first mortgage bonds of the Lamoille Valley, Montpelier and St. Johnsbury, and Essex County Railroad companies. They were secured by a first mortgage upon the franchises, road-beds, tracks, rolling stock and tools of all three railroad corporations, were dated May 1, 1871, and were payable in gold coin in twenty years from date, and at the option of the corporations after five years from date, with semiannual interest coupons attached at six per cent., payable also in gold coin. These three railroads were together about 120 miles long, and their capital stock actually paid in in cash was from $10,000 to $12,000 per mile on the average. They passed through a good section of the state for local business, which had before been without railroad facilities; and they connected at Swanton with the Vermont and Canada Railroad, and thence by way of Rouse's Point and Ogdensburg with a through line to the West; at Lunenburg they connected with the Maine and New Hampshire division of the Portland and Ogdensburg Railroad, then in process of construction, and upon completion of this latter line, (which has since been completed,) they would form a part of the shortest line between the seaboard and the great lakes; a line with very favorable grades for the transportation of freight, and promising to be a favorite route for pleasure travel. About sixty miles of the line in Vermont, being a portion of the whole of each of the three roads, was completed and in operation at the beginning of 1873, and a very considerable portion of the grading on the rest of the line, nearly or quite one half, was done at that time. The three roads were built under one management, and were all contracted for in 1873 under very favorable contracts. The entire issue of bonds secured by the mortgage was $2,300,000. They were all issued to the trustees in the summer of 1871, and from $1,300,000 to $1,400,000 of them had been sold when the financial panic of 1873 stopped their sale at what were considered proper prices, and the balance have not been sold.

French had had experience in making investments for himself, also as treasurer of a savings bank in the town of Palmer, and

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as president of a national bank in Palmer. In the latter part of 1871, he purchased Portland and Ogdensburg Railroad bonds for Samuel A. Hitchcock, of Brimfield, to the amount of $83,000, and soon afterward $17,000 more, with which he endowed scholarships at Amherst College. Before purchasing the first lot of such bonds as trustee in April, 1872, he consulted with Hitchcock, and also with the treasurer of Monson Academy, who held some of the bonds, and also with members of the firm of Fairbanks & Co., financial agents for selling the bonds, and with Fairbanks, Brown & Co. and Brewster, Sweet & Co. of Boston, who were agents for selling the bonds of the New Hampshire and Maine division of the Portland and Ogdensburg Railroad line, all of whom recommended the investment, and all of whom were persons of reputed good judgment in financial matters, and in whose integrity he confided. Before buying the second lot of bonds in November, 1872, he again examined the condition of the road, procured an autograph letter from the engineer of the three roads, giving particulars about them in detail, and again consulted with the above persons and with numerous others; and the result of all his inquiries and investigations was to satisfy his mind that the investment was a safe and prudent one at the time.

The roads were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability; and in 1872 the bonds were selling from eighty to ninety per cent. of their par value, according to the size of the lots sold, were regarded as a first-class investment, and were purchased, by persons of reputed good judgment, for permanent investment. French paid for the bonds eighty-five per cent. of their par value; but at the time of the hearing, and for a long time before, they had very largely depreciated, and were offered for sale at from one fifth to one quarter of their cost, no purchasers being found. There was also evidence that within the last two years no more than ten per cent. of their par value was offered in the market. It appeared that interest had not been paid on the bonds since 1875. The note of Fairbanks was for a loan made in November, 1873, and was originally for $11,000, payable on demand to the order of H. Fairbanks, chairman, and indorsed by him with interest at ten per cent., and secured by

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such bonds to the amount of $22,000 at their par value. On February 2, 1875, $5500 was paid on the note, and one half of the collateral was surrendered.

The trust fund, at the time of the allowance of the account objected to, amounted to about $60,000, of which only $2150 were invested in a mortgage of real estate, and none in bonds of the United States.

It was not charged by the appellant that, in the management of the funds in his hands, the trustee had any dishonest or fraudulent intent; and it was proved and conceded that, in making the investments objected to, he honestly and in truth believed that they were safe and proper investments for him to make, in his capacity as trustee. Whether in so doing he acted with the sound discretion which the law requires of a trustee, (taking into consideration the position and character of the funds as he received them, the recommendation expressed in the will, the character and prospects of the corporation in whose bonds he invested, and generally the time and circumstances of the case,) was a question upon which the judge had doubts, and reserved the case for the consideration of the full court. If, upon the facts reported, it was not an act of reasonable and sound discretion, on the part of the trustee, to make the investment complained of, under the circumstances and in the manner above set forth, then his account was to be disallowed, corrected or modified, as law and justice should require.

H. Morris & A. M. Copeland, for the appellant. 1. The trustee should have reasonably regarded the recommendation of the testator to keep at least one half of the funds invested on mortgage of unincumbered real estate. *Harvard College* v. *Amory*, 9 Pick. 446, 462. Perry on Trusts, § 452.

2. A trustee is bound to act in good faith, and also to exercise a sound discretion, in his investments of the trust property. *Doyle* v. *Blake*, 2 Sch. & Lef. 230. *Clark* v. *Garfield*, 8 Allen, 427. *Kimball* v. *Reding*, 11 Foster, 352. *Freeman* v. *Cook*, 6 Ired. Eq. 373. He failed to exercise such discretion when he sold government bonds and invested the proceeds in railroad bonds. *Mortimore* v. *Mortimore*, 4 De G. & J. 472. Willis on Trustees, 125, 184. Investing in bonds of an unfinished railroad is but an adventure; and is contrary to the plain duty of

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a trustee. *Kimball* v. *Reding*, *ubi supra*. *Pray's Appeals*, 34 Penn. St. 100.

3. The case at bar differs from *Harvard College* v. *Amory*, 9 Pick. 446, and from *Lovell* v. *Minot*, 20 Pick. 116. In the first case, the investment of trust funds in the stock of a manufacturing company was sanctioned by the testator and by the terms of the will, and it was an investment in stock which was paying an income. In the second case, the investment was not in the stock of a manufacturing company, but the trustee took the stock as collateral security, with a large margin in his favor, to secure the payment of the promissory note of a person of good credit.

M. P. Knowlton & S. S. Taft, for the appellee.

GRAY, C. J. In the leading case of *Harvard College* v. *Amory*, 9 Pick. 446, the testator directed his trustees to lend the trust fund upon ample and sufficient security, "or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stocks from time to time, as the safety and interest of said trust fund may in their judgment require." The court, in a thoroughly considered opinion, delivered by Mr. Justice Putnam, held that the trustees were authorized to invest in stocks of manufacturing corporations or incorporated insurance companies; and, after observing that the English rule, which requires trustees to invest in public funds only, had never been recognized here, laid down this general rule: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." 9 Pick. 461.

The rule thus judicially declared nearly half a century ago has been since constantly adhered to in this Commonwealth, and has been applied to cases in which the terms of the trust contained no special provisions upon the subject. *Lovell* v.

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Minot, 20 Pick. 116. *Kinmonth* v. *Brigham*, 5 Allen, 270, 277. *Clark* v. *Garfield*, 8 Allen, 427. If a more strict and precise rule should be deemed expedient, it must be enacted by the Legislature. It cannot be introduced by judicial decision without working great hardship and injustice.

In the case before us, the testator expressly gave his trustees the largest discretion to use their own judgment as to investing the trust fund. While he recommended to them the propriety of keeping at least one half thereof invested on mortgage of real estate, he did not command them to do so, and in fact no part of the fund was so invested at the time of the appellee's appointment. The investments objected to were in Portland and Ogdensburg Railroad bonds at eighty-five per cent. of their par value; and in a promissory note of an individual, secured by pledge of twice its amount of such bonds. The question of the lawfulness and fitness of the investments is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated.

The circumstances existing at that time are fully stated in the report, and may be summed up as follows: These bonds were payable in gold in twenty years, or at the option of the obligor after five years, with coupons attached for the payment in gold of interest semiannually at six per cent., and were secured by a first mortgage upon the franchises and property of three railroad corporations, the whole of whose stock had been actually paid in in cash and was equal in amount to the whole of the bonds which have been sold by the trustees to whom they were originally issued, and whose roads formed part of a continuous and direct line from Portland in the State of Maine to Ogdensburg in the State of New York, and themselves formed a line of about a hundred and twenty miles in the State of Vermont, half of which was already complete and in operation, and the rest of which was in the course of completion under very favorable contracts. The roads were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability; and the bonds were selling in the market at from eighty to ninety per cent. of their par value, according to the size of the lots sold, and were regarded as a first-class investment, and were purchased, by persons of reputed good judgment, for perma-

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nent investment. The appellee had had experience in making investments for himself and others, including banks in which he was an officer, and made the investments now in question after advising with various persons reputed of good judgment in financial matters, and after himself making careful inquiries and investigations, the result of which was to satisfy his mind that the investments were safe and prudent ones at the time.

Neither the fact that the whole line of railroads was outside this Commonwealth, nor the fact that the money applied to this investment was derived from the sale of bonds of the United States, is sufficient to control the effect of the other facts reported.

The appellant does not charge any dishonest or fraudulent intent on the part of the appellee, but concedes that, in making the investments objected to, he honestly and in truth believed that they were safe and proper investments for him to make in his capacity as trustee. Upon the only question reserved (which is a question of fact rather than of law) we do not share the doubts of the justice of this court before whom the hearing was had, but are clearly of opinion that, under all the circumstances stated in the report, the trustee acted with the sound discretion that the law required of him.

Decree of Probate Court affirmed.

GEORGE W. SWETT & others *vs.* SIMON G. SOUTHWORTH & another.

Hampden. Sept. 25. — Oct. 21, 1878. AMES & SOULE, JJ., absent.

In an action of contract on a promissory note and on an account annexed, the defence of payment is open under an answer alleging "that if the plaintiff shall prove the making of the note declared on, or any of the items in the plaintiff's bill of particulars, the same have been fully paid."

In an action for goods sold and delivered, the only issue was payment. The evidence tended to show that the defendant sent the plaintiff the note of a third person indorsed by the defendant, together with his own check for a small amount, in payment, and the same were received by the plaintiff with full knowledge that such was the defendant's intention; that the plaintiff, upon receiving the note and check, indorsed the latter, and sent it with the note to a mercantile agency, with instructions to send the note to its attorney and have the same returned to the de-

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fendant, and the plaintiff's account collected; that the agency followed these instructions, but its attorney, instead of returning the note and check as directed, indorsed the latter, deposited it in bank, and it was duly paid, and returned to the defendant in the ordinary course of business; that the attorney lost the note soon after receiving it, but did not inform either the plaintiff or defendant of the loss until after its maturity, and more than four months after its loss, when he wrote the defendant that the note was lost; that the maker of the lost note was able and ready to pay it at its maturity, had he been called upon to do so; that the plaintiff supposed the note had been returned to the defendant; that the defendant was never given a receipt for the account; and that the note in suit was never returned to him, but he supposed that the note of the third party and his own check had been received by the plaintiff, in payment of the account and note in suit. *Held*, that the evidence warranted the inference that the attorney was the agent of the plaintiff, for whose neglect he was responsible; that the laches and misconduct of the agent made the note and check the property of the plaintiff, and operated as satisfaction of his demand; and that there was sufficient evidence of payment.

CONTRACT upon an account annexed for goods sold and delivered, and upon a promissory note given by the defendants to the plaintiffs. Answer: 1. A general denial. 2. "And the defendants aver that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid."

At the trial in the Superior Court, before *Gardner*, J., without a jury, the plaintiffs objected to the admission of any evidence of payment under this answer; but the judge overruled the objection.

It appeared that the plaintiffs, who did business in Troy, N. Y., sold the goods declared for to the defendants, who did business at Chicopee in this Commonwealth; and that the note in suit was given by the defendants for other goods similarly sold and delivered. It was conceded that the note and account were correct and due, unless the plaintiffs had been paid.

To prove payment, the defendants offered evidence tending to show that the plaintiffs sent the note and account to a collection agency in Troy, N. Y., for collection; that the agency sent the same in the ordinary course of business to an attorney at law in the county of Hampshire, for collection; that the plaintiffs, in March, prior to sending the note and account to said agency, had written to the defendants, saying, if the note and account were not settled, they would sue the same; that soon after the receipt of this, on March 10, 1874, in response to a demand from

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the plaintiffs, they sent to the latter, in payment of the note and account, a note for $100, dated February 25, 1874, signed by Gabriel Benn, payable to the defendants in five months, and by them indorsed in blank, together with a check for $7.76, signed by the defendants, which balanced the plaintiffs' demand against them. No question was made by the plaintiffs that the note and check were sent by the defendants with the intention of balancing the demand, and that it was so understood by the plaintiffs. The plaintiffs, upon receiving the note and check, indorsed the check, and sent the same, with the note, to the agency in Troy, with instructions to send the note to its correspondent in Massachusetts, and have the same returned to the defendants, and the plaintiffs' original note and account collected. The agency followed these instructions, and the attorney in Massachusetts received the Benn note and check on March 27, 1874. He forthwith indorsed the check, deposited it in bank, and it was duly paid and returned to the defendants in the ordinary course of business. The attorney lost the Benn note soon after receiving it, but did not notify either the plaintiffs or the defendants of the loss until August 13, 1874, when he wrote the defendants that the note was lost, that the plaintiffs refused to receive it as payment, and demanding payment of the original note and account in his hands for collection.

There was also evidence tending to show that Benn was able and ready to pay the note at its maturity, had he been called upon to do so; that the plaintiffs did not authorize their attorneys to accept the Benn note in payment of the note and account in suit, and supposed the Benn note had been returned to the defendants; that the defendants were never given a receipt for the account; and that the note in suit was never returned to them.

The plaintiffs contended that the above evidence did not, in law, amount to payment; and requested the judge to rule as follows: "1. If the plaintiffs seasonably handed the note of Benn to their attorneys at Troy, with directions, which were never revoked nor waived, to return the same to the defendants, and they, in pursuance of that direction, sent it to an attorney in Massachusetts with explicit instructions to return it to the defendants, and the last-named attorney accidentally lost the note

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so that he could not return it, that would not preclude the plaintiffs from recovering. 2. The failure of the attorney in Massachusetts to return the note would not amount to payment, and would be no defence to this action." The judge declined so to rule; but ruled that the facts furnished sufficient evidence of payment; and found for the defendants. The plaintiffs alleged exceptions.

L. White, for the plaintiffs, to the point that the answer did not sufficiently aver payment, cited *Suit* v. *Woodhall*, 116 Mass. 547; *Jackman* v. *Doland*, 116 Mass. 550; *Caverly* v. *McOwen*, 123 Mass. 574.

C. L. Long, for the defendants.

ENDICOTT, J. The defence of payment is positively averred in the answer. After a general denial, "the defendants aver, that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid." The case is clearly to be distinguished from *Caverly* v. *McOwen*, 123 Mass. 574, and the other cases cited by the plaintiffs.

It appears from the bill of exceptions, that the defendants sent the note of a third party, indorsed by them, together with their own check for a small amount, to the plaintiffs, as and for payment of the plaintiffs' demand, and the same were received by the plaintiffs with full knowledge that such was the defendants' intention. If the plaintiffs were unwilling to accept the note and check in payment, it was their duty within a reasonable time to return them to the defendants, directly or through their agents, to whom they had entrusted the collection of their demand. There was evidence from which it might fairly be inferred that the person to whom they were sent in Massachusetts, to be returned to the defendants, was the agent of the plaintiffs, for whose neglect they were responsible. This agent, instead of returning them as directed, indorsed the check, deposited the same in bank, and it was duly paid, and returned to the defendants through their own bank; the note he lost soon after receiving it. After the maturity of the note, and more than four months after its loss, he wrote to the defendants that the note was lost, that the plaintiffs refused to receive it, and demanding payment of the original debt in his hands for collection.

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By the neglect of their agent the note was not returned within a reasonable time; and although the defendants had reason to suppose, from the collection of their check, that the check and note had been accepted in payment, they received no notice of the loss of the note until after its maturity. The laches and misconduct of the plaintiffs' agent made the note and check their own, and operated as satisfaction of their demand. The plaintiffs cannot now say that their demand was not paid by the note and check; and the presiding judge correctly ruled that there was sufficient evidence of payment. See *Taylor* v. *Wilson*, 11 Met. 44; *Camidge* v. *Allenby*, 6 B. & C. 373.

Exceptions overruled.

LOUISA S. DAWES *vs.* LOUIS RODIER.

Hampden. Sept. 25. — Oct. 21, 1878. AMES & SOULE, JJ., absent.

Where a married woman carries on the business of keeping a boarding-house, the debts due to her for board are a part of the property employed in the business, within the meaning of the St. of 1862, c. 198, § 1; and, if she fails to file the certificate required by that statute, such debts are liable to attachment by the creditors of her husband.

Where a married woman carries on the business of keeping a boarding-house in one town, and there files the certificate required by the St. of 1862, c. 198, § 1, and removes to another town, but neglects to seasonably file a new certificate in the latter town, the debts due to her for board furnished in the former town, although protected, while she resides there, by the first certificate, are liable to attachment by the creditors of her husband after her removal and before the filing of a new certificate.

CONTRACT upon an account annexed for board and lodging from August 17 to November 17, 1877. Writ dated November 24, 1877. The case was submitted to the judgment of the Superior Court upon an agreed statement of facts in substance as follows:

On April 1, 1877, the plaintiff was a married woman, living with her husband, and has continued so to do to the present time. From that date to January 1, 1878, she kept a boarding-house, on her separate account, in the house occupied by her and her husband as their home in West Springfield. On January 1,

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1878, she and her husband removed their home to Springfield, and on the same day she removed her business to the new home, and continued to carry it on there until February 1, 1878, and after. In the course of her business, and as a part thereof, she furnished the defendant board and lodging from August 17 to November 17, 1877, for which the defendant was to pay her the sum of $59, and did pay her at sundry times sums aggregating $26, the last payment being made on October 6, 1877. On November 22, 1877, she filed in the clerk's office of West Springfield a certificate substantially in compliance with the St. of 1862, *c.* 198, § 1, setting forth that she proposed to keep a boarding-house on her separate account, which certificate bore date April 1, 1877. On February 1, 1878, she filed in the clerk's office of Springfield a like certificate, but adapted to the changed location of her business, which last named certificate bore date January 31, 1878. No other certificate was ever filed by her. On November 1, 1877, the debt then owing by the defendant to the plaintiff, amounting to $22.83, on account of board and lodging furnished, was attached by trustee process in an action brought by a creditor of the plaintiff's husband against the husband in a court having jurisdiction of the cause and the parties, in which action this defendant was defaulted and adjudged the trustee of the husband. Execution issued, and on November 21, 1877, the defendant paid thereon the sum of $22.83.

In like manner, on January 19, 1878, the further debt, amounting to $10.17, then owing by the defendant to the plaintiff on account of board and lodging furnished the defendant while the plaintiff was living and carrying on her business in West Springfield, was attached in an action by the same creditor of the plaintiff's husband, in which action the defendant was also defaulted and adjudged the trustee of the husband. Execution issued, and on February 14, 1878, the defendant paid thereon said sum of $10.17.

On the above facts, *Allen*, J., ordered judgment for the plaintiff for $33; and reported the case for the determination of this court.

J. M. Ross, for the plaintiff.

J. L. Rice, for the defendant.

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MORTON, J. Under the General Statutes, a married woman might carry on any trade or business in the same manner as if she were sole, and her separate property, employed in or acquired by such trade or business, was not subject to the control of her husband or liable for his debts. Gen. Sts. *c.* 108, §§ 1–3. The St. of 1862, *c.* 198, made important changes as to the rights and liabilities of a married woman who carries on any business on her own account. It provides that "any married woman, now doing or hereafter proposing to do business on her separate account, shall file a certificate in the clerk's office of the city or town where she does or proposes to do said business, setting forth the name of her husband, the nature of the business proposed to be done, and the place where it is to be done, giving the street and number of the place of business, if practicable; and whenever the place of business or the nature of the business is changed, a new certificate shall be filed accordingly. In case no such certificate shall be filed, such married woman shall not be allowed to claim any property employed in said business as against any creditors of her husband, but the same may be attached on mesne process by any such creditor, or taken upon execution, against the husband of said woman." St. 1862, *c.* 198, § 1. It was decided in *Chapman* v. *Briggs*, 11 Allen, 546, that this statute extends to the business of keeping a boarding-house, and that if a married woman carrying on such business neglects to file the certificate therein required, her furniture employed in the business is liable to attachment by the creditors of her husband.

In the case of a married woman carrying on the business of keeping a boarding-house, we are of opinion that the debts of the boarders for board must be deemed to be property employed in the business, within the meaning of the statute. In the case of a business of dealing in merchandise in which it is usual to sell on credit, the outstanding debts would be universally recognized as a part of the capital or property employed in the business. So in the case of the business of keeping a boarding-house, the money or property put into the business may be changed in part into the form of debts due for board, but such outstanding debts remain a part of the capital or property employed in the business.

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Applying these considerations to the case at bar, the necessary conclusion is, that the plaintiff cannot recover the amount of $22.83 paid by the defendant upon the first execution against the husband of the plaintiff. She carried on the business of keeping a boarding-house in West Springfield, but did not file the certificate required by the statute until November 22, 1877. On November 1, 1877, the debt then owing by the defendant for board was attached by a trustee process brought by a creditor of the husband. At that time, no certificate having been filed, this debt, and all the other property employed in the business, was liable to attachment by the creditors of the husband, and the defendant having been charged as trustee, and having, as he was bound to do, paid the amount of the debt upon the execution against the husband, is not now liable to the plaintiff therefor.

In regard to the sum of $10.17, paid by the defendant after being charged as trustee in the second suit against the plaintiff's husband, the facts are different, but the result is the same. On January 1, 1878, the plaintiff changed her place of business from West Springfield to Springfield, but she neglected to file a certificate in the clerk's office of Springfield until February 1, 1878. On January 19, 1878, the defendant was summoned as the trustee of the husband, he then owing the said sum of $10.17 for board furnished in West Springfield after the certificate was filed in West Springfield. Undoubtedly this debt was exempt from attachment by the creditors of the husband as long as the plaintiff remained in West Springfield. But, upon her removal to Springfield, the statute required her to file a new certificate in that place, and, until such certificate was filed, all her property employed in the business was liable to be attached on mesne process by any creditor of the husband. The mere change in the place of business would not change the character of this debt. It still remained a part of her property employed in the business, and, like the furniture, was liable to be attached by a creditor of the husband until she filed the new certificate in Springfield. It follows that, as the defendant paid this amount upon an execution against the husband, after being lawfully charged as his trustee, the plaintiff cannot now recover it.

Judgment for the defendant.

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PATRICK McINERNY *vs.* LAWRENCE A. SAMUELS & another.

Hampden. Sept. 25. — Oct. 21, 1878. AMES & SOULE, JJ., absent.

If the notice of a person's desire to take the oath for the relief of poor debtors, issued by a magistrate having jurisdiction of the subject matter and of the parties, is given before the expiration of seven days from the time of giving a prior notice, the appearance of the creditor before the magistrate, without objection, at the hearing on the second notice, is a waiver of his right to contest the validity of that notice, although the first notice was sufficient in form and service.

CONTRACT upon a poor debtor's recognizance, entered into under the Gen. Sts. *c.* 124, § 10, on June 15, 1877, by the defendant Samuels as principal, and the other defendant as surety, and containing the usual conditions. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon an agreed statement of facts, the material parts of which appear in the opinion.

W. G. White, for the plaintiff.

F. H. Gillett, for the defendants.

LORD, J. The question to be determined in this case is, whether, upon the facts agreed, there has been a breach of the condition of the recognizance declared on.

On June 15, 1877, Samuels was arrested on an execution in favor of the plaintiff, and entered into the recognizance; and, on July 9, applied to a master in chancery, informing him that he desired to take the oath for the relief of poor debtors, and requested that a time be fixed for the examination. The record of the master in chancery recites that he thereupon fixed July 13, at two o'clock in the afternoon, and his office in Springfield, as the time and place for such examination, and thereupon issued a notice to the judgment creditor, and delivered it to Samuels, which notice was never returned to him, and no proceedings were ever had by him in accordance therewith; that on July 11, learning that the time named in the notice was not the time so fixed by him, but another time, to wit, July 18, he informed the attorney of the judgment creditor that the notice which had been served upon such attorney was defective in form, inasmuch as it named a time for the examination of Samuels which had not been fixed, and did not name the time which had been fixed,

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and that he should issue a new notice in substitution for such erroneous notice, and cause it to be served; that thereupon he did issue such notice on July 11, naming the time so fixed, to wit, July 13, at two o'clock in the afternoon, as the time, and his office in Springfield as the place, for such examination, and caused the same to be served, as appears by the return of the officer.

It was further agreed, if competent, that a notice, dated July 9, 1877, naming July 18, 1877, as the time for the hearing, was seasonably and duly served on the plaintiff's attorney. Assuming it to be competent evidence, the plaintiff contends that, the magistrate having fixed July 18, and given notice of the same on July 9 to the creditor, his subsequent notice, dated July 11, fixing the date as July 13, was improperly issued on July 11, the previous notice of July 9 not being defective in form or service; inasmuch as by the Gen. Sts. *c.* 124, § 14, it is provided that, when a defendant has given notice of his desire to take the oath for the relief of poor debtors, no new notice of the same shall be given until the expiration of seven days from the service of the former notice, unless the former was insufficient in form or service; and, consequently, that all the proceedings under the notice of July 11 were *coram non judice*, and therefore absolutely void.

We think, however, that such is not a true view of the case. A notice was, in fact, given on July 11, citing the party to appear on July 13. The plaintiff appeared at the time and place appointed, and the defendant Samuels also appeared at the same time and place, and submitted himself to examination, under oath, concerning his estate and effects. The hearing was, on motion of the plaintiff's attorney, adjourned to July 20, at two o'clock P. M., at the same place, at which time and place the plaintiff, by his attorney, and the debtor also appeared. On motion of the plaintiff's attorney, the hearing was further adjourned to July 23, at two P. M., at the same place, on which last day the debtor appeared at the time and place fixed, and remained until three o'clock; but the judgment creditor did not appear, either by himself or by attorney, and the debtor was discharged without having the oath administered to him. The plaintiff cites the language of Morton, J., in *Carlisle* v. *Weston*,

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21 Pick. 535: "Irregularities and defects may be waived, but mere nullities cannot be cured, or restored to life, inasmuch as they never possessed any legal validity. Jurisdiction cannot be given by consent of parties." And also, "Wherever it appears upon the record that the court has no jurisdiction, nothing which the parties may do or omit to do will give it."

If this was a case in which the magistrate had no jurisdiction, these remarks would be precisely applicable. But in this case the magistrate had jurisdiction, both of the subject matter and of the parties. In the case of *Carlisle* v. *Weston*, while the language attributed to that justice was used by him, the case itself is decisive against the plaintiff. In that case, service of the writ was made by a coroner, who had no authority to serve the precept. At the return term, the defendant appeared and put in a plea, and joined in a demurrer by which the action was carried to this court. He entered an appearance generally in this court, waived his plea, and moved to dismiss the action because there had been no proper service. It was held that the exception was taken too late, and the justice delivering the opinion cites authorities to the principle that, "It is an elementary rule of pleading, that a plea to the jurisdiction is the first in the order of pleading; and that any plea which refers to the court any other question is a tacit admission that the court has a right to judge in the cause, and is a waiver of all exception to the jurisdiction;" and adds, what is peculiarly applicable to this case, "The irregularity in the service of this writ could do the defendant no possible injury. He was seasonably notified of the commencement of the action, appeared on the return day of the writ, made such motions and filed such pleas as he thought best adapted to protect his legal rights, and now has open to him every ground of defence, and may avail himself of every legal exception which he could have done" had the service been proper.

In *Simonds* v. *Parker*, 1 Met. 508, Chief Justice Shaw said: "If a party takes no notice of any matter of exception to the form or service of the process, in an early stage of the proceedings, it affords a reasonable ground to conclude that he considers them of no importance, and is willing to proceed to the trial of his rights upon the substantial merits of the controversy. By

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referring any question to the court, other than that of the jurisdiction itself, he acknowledges that jurisdiction." In *Kittridge* v. *Bancroft*, 1 Met. 513, the action was entered at December term, and continued to the succeeding June and September terms, at the latter of which the motion to dismiss was made; and the court said: "The court are of opinion that these continuances bring the case within the principle stated" in *Simonds* v. *Parker*. See also *Gage* v. *Gannet*, 10 Mass. 176; *Ripley* v. *Warren*, 2 Pick. 592. These and other decisions are decisive. The master in chancery had full jurisdiction of the subject matter, authority to issue a notice, and the notice was served by a proper officer. The plaintiff appeared, took part in the proceedings, and on his motion the subject was postponed from time to time. This, within the cases, is a sufficient waiver of any defect in service.

The case of *Millett* v. *Lemon*, 113 Mass. 355, has no bearing upon this. In that case there was no appearance of the creditor before the magistrate at any one of the various times appointed for the hearing. It is true that, on one of the occasions, the creditor started for the office of the magistrate, and arrived there at about five minutes before the expiration of the hour, but found the magistrate gone, and nobody there. There is no sense, therefore, in which it could be said that the creditor in that case waived the irregularity of the notice.

Judgment for the defendant.

RODOLPHUS C. CLARK *vs.* JOHN C. GAMWELL.

Hampden. Sept. 25. — Oct. 21, 1878. AMES & SOULE, JJ., absent.

An agreement that the fee of an officer for keeping property, attached upon a writ in an action brought by the plaintiff against the defendant, should not be included in the taxation of costs, in consideration of a promise by the defendant to pay the same to the plaintiff in a few days, is a lawful contract; and, it appearing that there was a controversy between the parties as to whether such fee was properly taxable as a part of the costs, and that the agreement and promise were made as an adjustment of the controversy, is founded upon a sufficient consideration; and, upon the neglect of the defendant to pay as agreed, the plaintiff may maintain an action against him for the amount of the fee, although the plaintiff, at the time the action was begun, had not paid the fee to the officer.

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CONTRACT upon an account annexed for $108.50. Writ dated January 13, 1876. The declaration alleged that the plaintiff brought an action against the defendant and recovered judgment against him; that a horse belonging to the defendant was attached upon the writ in that action and placed in the hands of a keeper by the officer making the attachment; that after judgment was recovered, the defendant requested that the costs of keeping the horse should not be taxed in the taxation of costs and made part of the execution, and, in consideration thereof, promised to pay the plaintiff the same in a few days; that in consideration of said request and promise, the plaintiff consented that the fee for keeping the horse should not be so taxed; that the fee was not included in the taxation of costs; and that the defendant had not paid the plaintiff as agreed, but owed him the amount of the fee.

Answer: 1. A general denial; 2. Want of consideration; 3. That the declaration did not set out a legal cause of action.

At the trial in the Superior Court, before *Allen*, J., without a jury, the facts set out in the declaration were proved, substantially as alleged. It also appeared that there was a controversy between the parties as to whether the expenses of keeping the horse were properly taxable as a part of the costs of the suit, and the agreement and promise alleged in the declaration were made as an adjustment of this controversy; and that the plaintiff did not pay the officer's fee for keeping the horse until after this action was commenced. The defendant asked the judge to rule that the plaintiff had no cause of action against the defendant, at the time it was begun, because he had not then paid to the officer the fee for keeping the horse; that the fee could not legally be taxed in the bill of costs; and that the promise by the defendant to pay the same, for the consideration alleged in the declaration, would not support this action. The judge declined so to rule; and found for the plaintiff for the amount claimed. The defendant alleged exceptions.

H. Morris & A. M. Copeland, for the defendant.

E. H. Lathrop, for the plaintiff.

LORD, J. There does not appear to have been any error in the ruling of the presiding justice in this case. The action was brought to recover the expense of keeping a horse of the defend-

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ant, which the plaintiff had caused to be attached upon a writ against the defendant, and is founded upon an express promise by the defendant to pay for the same. It is assumed by the defendant that such an action, under the authority of *Cutter* v. *Howe*, 122 Mass. 541, cannot be maintained; but such is not the decision in that case. The question there arose upon the taxation of costs for keeping goods, attached by an officer, not perishable in their nature. It does not decide that any contract in reference to such goods, made either between an officer and either of the parties, or between the parties themselves, is void. In this case, it is found that the plaintiff caused to be attached a horse of the defendant. The provisions of the statute in relation to the attachment of live animals, or of property perishable in its nature, differ from those relating to the attachment of property not in its nature perishable. Gen. Sts. *c.* 123, §§ 73–78. Whether the horse attached was sold, under the provisions of the statute, or whether appraisers were appointed, conformably to law, or whether either party requested a sale of the horse to be made, does not appear.

There is no presumption that anything was done, either by the officer or the plaintiff, that was not authorized by law to be done. Nothing appearing to the contrary, some fee for the keeping of the horse was authorized by law. The proper amount of such fee, if there was any controversy upon the subject, must be determined, in the first instance, by the clerk in the taxation of costs; and if either party is dissatisfied with such taxation by the clerk, he may appeal to the court in which the proceeding is pending. In this case, it seems that the parties differed, as to whether any, or what charge for keeping was properly taxable. If any sum were taxable, it would become a part of the judgment, upon which execution should issue.

The presiding judge found that the plaintiff agreed that he would not claim any sum to be taxed in his bill of costs, and in consideration thereof, and "as an adjustment of the controversy," the defendant promised that he would pay the sum demanded in this suit. We are satisfied that such a promise is founded upon a good consideration. Whether the consideration was of equal value with the amount promised to be paid was a question for the defendant to determine for himself. He received some

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benefit in not being subject to an execution for the amount which was actually due, and the plaintiff lost some benefit by being put to his action to recover the amount, instead of having an execution issue for it.

Independently, however, of such consideration, the compromise of a claim, disputed wholly or in part, is a sufficient consideration for an express promise to pay. The fact that the plaintiff had not himself paid the amount, which, for aught that appears, he was liable to pay, does not affect the question.

Exceptions overruled.

FITCHBURG SAVINGS BANK *vs.* AMAZON INSURANCE COMPANY.

Worcester. October 2. — 7, 1878. AMES & SOULE, JJ., absent.

In an action on a policy of insurance on the property of A., "payable in case of loss to B., mortgagee," containing the condition that if the assured's interest was other than "free and unincumbered," "and is not so expressed in the written portion of the policy, then and in every such case this policy shall be void," it appeared that the property was subject to another mortgage to C., which was not stated in the policy. There was evidence that B. first obtained a policy on his interest as mortgagee from the company's agent, but, on the company's refusal to carry the risk in that form, accepted the policy in question on the assurance of the agent that he would be equally safe. *Held*, that the policy was void; and that the evidence was incompetent, and did not show that any other than A.'s interest was insured.

CONTRACT upon a policy of insurance dated June 1, 1876, by which the defendant insured F. S. Coolidge against loss or damage by fire or lightning to the amount of $1500, for the term of six months from June 1, 1876, upon certain mill property, "payable in case of loss to the Fitchburg Savings Bank, mortgagee." The policy also contained on its face, and before the signatures of the officers of the defendant company, the following provisions: "If any change takes place in the title or possession of the property, whether by sale, lease, legal process, judicial decree, voluntary transfer, conveyance or otherwise, or if the interest of the assured be any other than the entire, unconditional, free and unincumbered ownership of the property, and is not so expressed in the written portion of the policy, then and in every

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such case this policy shall be void." "The following facts are considered material to the risk and must be fully disclosed to the company, viz.: all facts relating to the title, ownership, possession or occupancy of the property insured, or any incumbrance thereon." "No waiver or modification of any of the terms or conditions of this policy shall be made in any event."

At the trial in the Superior Court, before *Bacon*, J., without a jury, it appeared that the buildings insured were destroyed by fire on October 7, 1876, and due proof of loss was made; and that the plaintiff had mortgages on the property to the amount of $4000.

The plaintiff was then allowed by consent to prove the following facts, all objection to the competency of the facts being reserved: On June 1 or 2, 1876, a policy of insurance, No. 157,728, with printed provisions like those in the present policy, and bearing the same date, on the same property and for the same amount, describing the property as owned by F. S. Coolidge, was issued through C. B. Dennis & Company, the local agents of the defendant, at Fitchburg, to the plaintiff, as mortgagee, who paid the premium thereon, and Dennis & Company made report thereof to the defendant at Cincinnati upon the usual blank provided for that purpose, and gave a copy of the written portion of the policy, and sent at the same time the following letter to the defendant:

"Dear Sir: Mr. Coolidge having indorsed notes of several of his customers, who have suspended, he has been obliged to stop. But his assets are equal to his debts, and his relations with his creditors are pleasant; he will be running again very soon, he expects within a month. There is no moral hazard, as the property is only partially insured, ($4000 in all, and the property is worth $10,000.) It is under good charge and well cared for. He is an intimate friend of ours, and we can vouch for him and the risk, as we are very well acquainted with all the circumstances in relation to it."

To this letter the defendant replied by letter dated June 26, 1876, as follows: "In re Fitchburg Savings Bank, mortgagee. As a general rule we decline propositions for insurance on mills not in operation, but are disposed to listen to your plea in regard to Mr. F. S. Coolidge, provided form of policy can be modified.

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If you can write it to owner, Mr. Coolidge, direct, loss if any payable to bank as its mortgagee interest may appear, we will carry the risk, in which case make full daily report of new No., values, other insurance, &c. If this modification be not acceptable, cancel 157,728, and let us withdraw altogether from the risk."

Dennis took this letter to the plaintiff, showed it to its officers, and the first policy was cancelled and the present policy delivered to the plaintiff on June 28 or 29, 1876, and report thereof was made by Dennis & Company to the defendant.

Andrew Jewett, the assistant treasurer of the plaintiff, testified as follows: "I recollect Dennis coming to the bank about the insurance; we told him we wanted about $2500. He wanted to put some of it in the Amazon Company, and represented that it was as good as any company. We then took out a policy in the company as mortgagee. Some time afterwards, Dennis came to the bank and brought in another policy and said 'Look here, I want to change that policy,' said he had had a letter from the president, who said they could not carry the risk in that form; that they had a by-law; that they would not insure the mortgagee's risk; that their directors were very conservative and would throw out any such risk as that and would not pass it. He said 'I have here a policy in name of F. S. Coolidge, payable to Savings Bank in case of loss.' I told him I did not like to change policies, we were all right as we were. He said we would be just as well off with a policy in this form as with the one we had; and in that way they would get round the by-law. I told him then that I could not change the policy without the consent of Mr. Billings, the treasurer. Mr. Billings then came in, and Dennis told him also that we were as well off with this policy as the other. Billings said if we could recover in case of loss as well under this as the other, he would consent to change. We paid the premium on the policy. Dennis replied to Billings that it was payable to the bank in case of loss, and the company could not help paying. Billings told Dennis that he did not care what the form of the policy was so long as the bank was secure in case of loss."

Dennis testified that when he obtained the policy in the Amazon Insurance Company on the property of F. S. Coolidge for

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the Fitchburg Savings Bank, he stated to Mr. Jewett, the assistant treasurer of the bank, that the company objected to making a policy to the bank direct as mortgagee, but would write it to F. S. Coolidge direct, payable to the bank in case of loss, and that the bank would be just as safe with that as with a policy running direct to it as mortgagee; that, in case of loss, it could recover as well as if running to it as mortgagee; that the bank paid the premium.

The defendant then proved the following facts: On August 14, 1875, F. S. Coolidge mortgaged the premises to Samuel G. Kendall for $1500 by a mortgage duly recorded and not discharged of record. On May 6, 1876, Coolidge filed his petition in bankruptcy and was adjudicated a bankrupt on May 15, 1876, and an assignment of his estate was made on June 8, 1876, to William Woodbury, assignee. On July 10, 1876, Woodbury, as assignee, conveyed the premises to Ellen D. Coolidge, wife of Frederick S. Coolidge, by deed duly executed and recorded. No notice of any of the conveyances or other proceedings in bankruptcy was given to the plaintiff, or indorsed upon the policy. In respect to the mortgage to Kendall, there was no evidence whether the plaintiff knew of its existence, or whether its existence was known or communicated to the defendant.

The defendant contended that the policy was void by reason of these conveyances and proceedings in bankruptcy above mentioned, and that it was incompetent for the plaintiff to prove by parol evidence that the defendant intended by this policy to insure the plaintiff's interest as mortgagee, and that the evidence introduced, even if competent, did not prove such intent on the part of the defendant, but the contrary.

The judge found that the defendant intended by this policy to insure the plaintiff's interest as mortgagee, ruled that the plaintiff was entitled to recover the full amount of the policy, and gave judgment for the plaintiff. The defendant alleged exceptions.

C. Allen, for the defendant, was stopped by the court.

G. A. Torrey, for the plaintiff.

GRAY, C. J. The policy in suit is on the interest of Coolidge only, and the plaintiff is merely the payee of the policy, and not (as in the case of *Foster* v. *Equitable Ins. Co.* 2 Gray, 216, on

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which the plaintiff relies,) the assignee thereof in such form as to constitute a new contract between the assignee and the insurer by which the assignee becomes the assured. Coolidge being the only party insured, and his interest being subject to a mortgage to Kendall, which was not stated in the policy, the policy, by virtue of the provision upon its face, is void, and neither Coolidge nor the plaintiff can maintain an action thereon. *Franklin Savings Institution* v. *Central Ins. Co.* 119 Mass. 240. *Smith* v. *Union Ins. Co.* 120 Mass. 90.

The parol evidence introduced was incompetent in law to vary the contract between the parties, and did not in fact tend to show any fraud, or that the defendant's agent knew of the mortgage to Kendall, or undertook to insure any interest but that of Coolidge. *Exceptions sustained.*

JONAS A. MARSHALL *vs.* THOMAS C. CALDWELL & others.

Worcester. October 2. — 7, 1878. AMES & SOULE, JJ., absent.

A testator, by his will, gave the residue of his estate, real as well as personal, to two trustees, in trust, after the payment of certain legacies, to pay the annual income, in certain proportions, to his children during their lives, and, after their death, to divide the remainder among his grandchildren, with authority to sell and convey all the real estate when, in such manner, at such price, and in such parts and divisions, as to them may seem best and advisable. On a bill in equity, filed nineteen years after the testator's death, by one trustee against the other, for a sale of certain real estate, the judge before whom the case was heard found that the land remaining unsold had fallen in value during the past few years, and was not only wholly unproductive, but the amount of the annual taxes thereon had been paid out of the income of the rest of the trust fund; that there was an irreconcilable disagreement between the two trustees as to the propriety of selling it, though both testified that it could be sold by public auction for a greater sum than that at which it was appraised at the time of the testator's death; and that a reasonable and proper management of the estate and the interest of the *cestuis que trust* required a sale of the real estate, and an investment of the proceeds in productive property. *Held*, that the plaintiff was entitled to a decree directing the sale.

BILL IN EQUITY, filed January 30, 1878, by Jonas A. Marshall, a trustee under the will of Jonas Marshall, deceased, against Thomas C. Caldwell, his co-trustee, and the legatees under the will, to compel a sale of land.

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The testator died on December 31, 1858, and his will, which was duly admitted to probate on February 2, 1859, contained, besides other provisions not material to be stated, the following:

"I give, bequeath and devise unto my said executors, Jonas A. Marshall and Thomas C. Caldwell, and the survivor of them, all my estate of every kind and description, of which I may die seised, possessed or the owner in any way or manner, embracing all real, personal and mixed, to hold to them and the survivor of them in trust, and for the purposes below expressed.

"And for the purpose of carrying into execution my wishes and the several bequests by me hereinafter made and expressed, I do hereby authorize, empower and direct my said executors, and, in case of the decease of one of them, then the survivor, to sell and convey all said real estate when, in such manner, at such price and in such parts and divisions as to them or him may seem best and advisable, and upon such sale or sales good and sufficient deed or deeds thereof to make, execute and deliver."

The will, after giving various legacies, then proceeded as follows: "After applying, appropriating and paying the several legacies above named, I direct and order my said executors to hold all the balance, rest and residue of my estate given them as aforesaid, and pay out, deliver and distribute the same as follows, viz.:

"I give and bequeath and hereby direct my said executors to pay to my daughter Betsey Kimball, widow of Porter Kimball, deceased, the income, profits and interest of one fourth part of all of said balance of my estate annually during her natural life; and at her decease I direct my said executors to divide said one fourth part equally among her children and their heirs.

"I give and bequeath and I hereby direct my said executors to pay to my said daughter Charlotte Caldwell the income, profits and interest of one fourth part of all said balance of my said estate annually during her natural life; and at her decease I direct my said executors to divide said one fourth part equally among her children and their heirs.

"I give and bequeath and I hereby direct my said executors to pay to said Jonas A. Marshall the income, profits and interest of the remaining half of all said balance of my said estate annually during his natural life; and at his decease I direct my

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other executor to divide said half part equally among his (said Jonas A.'s) children and their heirs; provided said Jonas A. die leaving more than one child; but if at the decease of the said Jonas A. he leaves but one child surviving him, then said half part is to be paid and delivered him if he be twenty-one years of age; if not, then said half part and interest thereon is to be paid and delivered him when he arrives at the age of twenty-one years. But if the said Jonas A. die leaving no children surviving him, or but one, who dies before arriving at the age of twenty-one years, then I direct said executors to divide said half part of said estate equally among my other grandchildren."

At the hearing upon the pleadings and proofs, before *Endicott*, J., it appeared that the real estate at the testator's death was appraised at the sum of $32,000, and that the personal estate amounted to the sum of $56,000; that the executors had sold from time to time real estate to the amount of about $32,000; that there was remaining unsold real estate appraised by the assessors of Fitchburg, where the same is situated, at the sum of $40,000; that the legacies given by the will had been paid; that Betsey Kimball had died leaving heirs; that Charlotte Caldwell was living, having several children; and that Jonas A. Marshall, who was the only son of the testator, had one child living, who consented to the sale.

The judge found that the trustees were each equally intelligent, faithful and competent to execute the trust, except so far as might otherwise appear from the facts below set forth; that the real estate remaining unsold was not only entirely unproductive, but was a burden on the estate to the amount of $500, the annual taxes assessed thereon, which were deducted from the income of the residue of the estate; that the real estate was worth from $20,000 to $25,000, which, as both trustees testified, could probably be realized for the same by public auction; that the real estate would bring more now than its appraisal at the death of the testator; that Jonas A. Marshall was seventy-eight years of age, and was receiving an income of about $2000 annually; and that a reasonable and proper management of the estate and the interest of the *cestuis que trust* required a sale of the real estate by the trustees, and the investment thereof in productive property.

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The judge also found that Caldwell had never absolutely refused to sell such real estate, but, the same having fallen greatly in value during the past few years, in common with other real estate, he did not consider it reasonable to sell the same for the price at which he thought it could be sold, and was willing to sell it at a proper price, but was not willing to put the same up at auction, or to sell it at the present market price; and that there was an irreconcilable disagreement between the trustees as to the propriety of selling the real estate.

The judge was of opinion that the plaintiff was entitled to a decree directing the sale of the real estate under the power contained in the will; but, at the request of the defendant Thomas C. Caldwell, reserved the case for the consideration of the full court.

G. A. Torrey, for the plaintiff, cited *Bethell* v. *Abraham*, L. R. 17 Eq. 24; *Feltham* v. *Turner*, 23 L. T. (N. S.) 345; *Davey* v. *Ward*, 7 Ch. D. 754; *Chase* v. *Chase*, 2 Allen, 101; *Davenport* v. *Davenport*, 5 Allen, 464; *Eldredge* v. *Heard*, 106 Mass. 579; *Scott* v. *Rand*, 118 Mass. 215; *Curtis* v. *Smith*, 6 Blatchf. C. C. 537; *Arnold* v. *Gilbert*, 5 Barb. 190.

F. P. Goulding, for the defendant, cited *Walker* v. *Shore*, 19 Ves. 387, 392; *Amory* v. *Green*, 13 Allen, 413; *Proctor* v. *Heyer*, 122 Mass. 525; 2 Perry on Trusts, § 509; Hill on Trustees, 485, 488.

GRAY, C. J. The will manifests the testator's intention that from the residue of his estate, real as well as personal, his children should receive an income annually during their lives, and after their death the remainder should go to his grandchildren, and that, if necessary to carry out this intention, the real estate should be sold by the trustees. Equity will not allow the trustees, under the discretionary power conferred upon them as to the time and manner of sale, to defeat the intention of the testator, by unreasonably postponing the sale, to the detriment of those who are entitled to the income for life. Lord Hardwicke, in *Hawkins* v. *Chappel*, 1 Atk. 621, 623. Sir William Grant, in *Walker* v. *Shore*, 19 Ves. 387, 391, 392. Lord Brougham, in *Prendergast* v. *Prendergast*, 3 H. L. Cas. 195, 219.

Nineteen years have elapsed since the death of the testator, and the justice of this court before whom the case was heard

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has found, as matter of fact, that the real estate remaining unsold has fallen in value during the past few years, and is not only wholly unproductive, but the amount of the annual taxes thereon has been paid out of the income of the rest of the trust fund; and that there is an irreconcilable disagreement between the two trustees as to the propriety of selling it, though both of them testify that it can be sold by public auction for a greater sum than the amount at which it was appraised at the time of the death of the testator, and there is nothing before us to show that it is likely to rise in value. The judge also finds that a reasonable and proper management of the estate and the interest of the *cestuis que trust* require a sale of the real estate, and an investment of the proceeds in productive property, as prayed for in the bill.

Upon these facts, we concur in his opinion that the plaintiff is entitled to a decree directing a sale of the real estate under the power contained in the will; and it is accordingly ordered that it be sold by the trustees, either by public auction or private sale, in such parcels and at such times, within one year from the entry of the decree, as shall appear to them best and advisable, having regard to the interests of the tenants for life, as well as of the remaindermen. If the parties do not agree upon the form of the decree, it must be settled before a single justice. *Decree for the plaintiff.*

JOHN D. LOVELL *vs.* SUSAN E. WILLIAMS.

Worcester. October 1. — 21, 1878. AMES & SOULE, JJ., absent.

In an action against a married woman for goods sold and delivered to her husband, and used on a farm owned by her, on which she and her husband reside, evidence that she paid a bill for similar goods, bought by her husband during the time covered by the account in suit, is competent on the issue whether the husband acted as her agent in carrying on the farm.

Where a married woman lives with her husband on real estate which is her sole and separate property, there is no presumption of law that the husband is, and that the wife is not, liable for the ordinary expenditures for carrying on the estate.

If a person sells goods to another, who is the agent of an undisclosed principal, and takes the note of the purchaser in ignorance of such fact, the presumption that the note was taken in payment is rebutted, and the seller may resort to the undisclosed principal.

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CONTRACT. At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

W. S. B. Hopkins, for the defendant.

W. W. Rice, (*F. T. Blackmer* with him,) for the plaintiff.

MORTON, J. This is an action of contract to recover for merchandise, such as seeds, fertilizers and farming tools, sold and delivered to the husband of the defendant, and used on the farm owned by the defendant, and on which she and her husband resided. The ground upon which the plaintiff bases his claim is that the husband was carrying on the farm as the agent of the defendant, and that he has the right to resort to her as an undisclosed principal.

1. The defendant testified "that her husband had always carried on the farm by her leave, and was not her agent, and that she had nothing to do with the carrying on of the farm." The plaintiff was permitted, in rebuttal, against the objection of the defendant, to introduce testimony tending to show "that, in settlement of a bill for similar merchandise used on said farm, and sold, delivered and charged by another merchant in Worcester to the defendant's husband, in like manner that the plaintiff's merchandise was, and during the period of time covered by the plaintiff's account, this defendant gave her note, and, after one renewal, paid it."

We are of opinion that this evidence was competent. It proved an act of the defendant which had some tendency to contradict her testimony, and to show that she recognized her husband as her agent in carrying on the farm.

2. The defendant asked the court to rule that "when a married woman is living with her husband, whether on her real estate or not, in the absence of controlling evidence to the contrary, the presumption is that the expenses of the family and the ordinary expenditures for carrying on the place, are the husband's, and not the wife's." This ruling was properly refused. The case did not call for any ruling as to what would be the presumption if the husband and wife were living on real estate not her own property, or as to what would be the presumption in regard to "the expenses of the family."

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The instructions given in response to the request were such as were required by the evidence in the case, and were sufficiently favorable to the defendant. If a married woman lives with her husband upon real estate which is her sole and separate property, there is no presumption of law that she is not liable, and that he is liable, for "the ordinary expenditures for carrying on the place." Her liability in the case at bar depends upon the question of fact whether she has, personally or through an agent, entered into any contracts in reference to her separate property; and this question was properly submitted to the jury.

3. The defendant requested the court to rule that "the plaintiff cannot recover under the third count of his declaration, on the pleadings and the evidence." In regard to this count, it appears from the bill of exceptions that the goods embraced therein were sold prior to January 1, 1870; that on that day the note of the husband of the defendant "was given for the account declared on in the third count," and that the plaintiff did not discover until 1872 that the defendant owned the farm, and was liable to him as the undisclosed principal of her husband. At the trial, the defendant contended that this evidence proved conclusively that the account had been paid. The third request was refused, and the presiding judge, "after stating to the jury that the law in Massachusetts made a negotiable promissory note, given for an account, *primâ facie* payment of the account, added that, when the note given is not the obligation of all the parties who are liable for the account, the presumption, if it exists at all, is of much less weight; and that, in dealing with the question whether the note given in this case was received in payment, they were to consider this principle, if they should find upon the evidence that the husband was in fact the agent of the wife in making the purchase of the plaintiff, and that she was her husband's undisclosed principal in the transaction." To this instruction the defendant excepted, as not applicable to the facts in the case.

The rule in Massachusetts is, that if a negotiable promissory note is given for a preëxisting debt, the presumption is that the creditor intended to receive it in payment of such debt. But this presumption may be rebutted and controlled; and the fact that such presumption would deprive the creditor taking the

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note of the substantial benefit of some security, such as a mortgage, guaranty, or the like, has been held to be sufficient evidence to meet and repel the presumption. *Butts* v. *Dean*, 2 Met. 76. *Curtis* v. *Hubbard*, 9 Met. 322. *Appleton* v. *Parker*, 15 Gray, 173. *Tucker* v. *Drake*, 11 Allen, 145.

The case of *French* v. *Price*, 24 Pick. 13, more nearly resembles the case at bar. In that case, the plaintiff sold goods to an agent acting for undisclosed principals. He afterwards took the notes of the agent for the account, and the principal question of fact in the case was whether, at the time he took the notes, he knew that the agent was acting for undisclosed principals. The court, in the opinion, say: "If there was any deception or fraud in the giving of the notes, or if they were accepted under an ignorance of the facts, or a misapprehension of the rights of the parties, the vendors ought not to be bound by the acceptance. They may repudiate the notes, and rely upon the original contract of sale. If, when the notes were taken, the vendors supposed that the promisors only were holden for the goods, and that they were not changing the parties, but only taking new security from the same parties, then it is very clear that the original contract was not so far extinguished as to prevent a resort to it when new parties were discovered."

In the case at bar, the plaintiff, when he took the note in question, was ignorant of the fact that the husband of the defendant was her agent, and that she was liable for the goods sold. He supposed that the promisor on the note was alone liable for them. It would work a fraud on him to hold that the original contract was extinguished so as to prevent a resort to the defendant, when he discovered her liability under it.

It is clear, therefore, that the instructions given were sufficiently favorable to the defendant. *Exceptions overruled.*

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ABRAHAM HARRIS & another *vs.* FREDERICK THAYER.

Worcester. October 1. — 21, 1878. AMES & SOULE, JJ., absent.

In an action for goods sold and delivered, the defendant filed a declaration in set-off, alleging that during the two preceding years he had paid the plaintiff for goods according to the weights marked on them by the plaintiff, while the true weights were much less. There was evidence that during the two years the defendant had purchased of the plaintiff a large quantity of goods; that during this period the defendant and his men had noticed an unusual shrinkage in his stock; that after the goods sued for were delivered, and during the month before, the defendant caused to be weighed certain bales of stock sent him by the plaintiff, and found the weight of every bale to be uniformly much less than the weight marked thereon by him; that one of these bales had been in the defendant's storehouse nearly two years, the others having been delivered about the time of weighing; that the defendant could only ascertain the deficiency in the weight of the goods sold him by the plaintiff, save where he weighed them, by estimate from his books and the plaintiff's bills; that one of the defendant's men had noticed that one grade of stock, which fell short, mostly came from the plaintiff; and that for over a year the defendant had no scales, which the plaintiff knew. There was no evidence of any deficiency in weight in stock sold to the defendant by third persons; and the plaintiff offered no evidence to explain the detected deficiencies in weight, or to show that they were accidental or exceptional. The judge refused to rule, as requested by the plaintiff, that the defendant could recover under his declaration in set-off only for such deficiencies as were proved by actually weighing the goods, and that the evidence would not warrant the jury in finding any larger sum in his favor. *Held*, that the ruling was rightly refused.

In an action by two persons alleged to be partners, one of the plaintiffs was asked, on cross-examination, against the plaintiffs' objection, whether he was a partner with the other plaintiff named in the writ; whether a third person was his partner; and how much capital he put into the partnership. The jury returned a verdict for the plaintiffs; and they alleged exceptions which did not state the answers to these questions. *Held*, that it did not appear that the plaintiffs had any ground of exception.

CONTRACT by Abraham Harris and C. Herrman. The writ described the plaintiffs as copartners doing business under the firm name of Harris & Herrman. Writ dated November 15, 1876. The declaration was as follows: "And the plaintiffs say that the defendant owes them $1017.92, according to the account hereto annexed." The account annexed contained nine items for goods sold and delivered in September and October, 1876. The answer denied each and every allegation in the declaration and account annexed. The defendant also filed a declaration in set-off to recover $1126.37, alleging that on December 28, 1874, and on various days between that time and

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September 1, 1876, he had purchased goods of the plaintiffs, which were sent to him with the weights marked thereon, that these weights were not the true weights, but much greater; that he had paid for the goods according to the weights marked, and thus had paid the plaintiffs for goods not received.

The case was sent to an auditor, who found that the plaintiffs were entitled to recover on their declaration $850.48, and that the defendant was entitled to recover on his declaration in set-off the sum of $70.72, leaving a balance due the plaintiffs of $779.76, and interest from the date of the writ.

The case was then tried in the Superior Court, before *Aldrich*, J.; the jury returned a verdict for the plaintiffs for $425; and the plaintiffs alleged exceptions, the substance of which appears in the opinion.

B. W. Potter, for the plaintiffs.

F. P. Goulding, for the defendant.

MORTON, J. The principal question presented by the bill of exceptions is, whether there was sufficient evidence to justify the verdict of the jury, which allowed to the defendant a considerable part of the amount claimed by him in set-off. There was evidence that the defendant had been dealing with the plaintiffs for nearly two years, during which period he had purchased of them goods to the amount of between seven and eight thousand dollars, being stock used by him in the manufacture of shoddy; that during this period he and the men in his employ had noticed that there was an unusual shrinkage in the stock used by him, estimated to be 20 to 25 per cent.; that in August, September and October, 1876, he caused to be weighed about fifteen bales of the stock sent him by the plaintiffs, and found the weight of every bale to be much less than the weight marked thereon by the plaintiffs; that one of these was a bale delivered in January, 1875, which had remained in the defendant's storehouse, the others having been delivered about the time they were weighed; and that the defendant had no means of ascertaining the exact deficiency in the weight of the goods sold him by the plaintiffs, except in the cases where he had weighed the bales, but made up his account in set-off by estimate from the several bills of the plaintiffs and from his books. One of the defendant's men testified that he noticed that one grade of stock

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which fell short mostly came from the plaintiffs. There was also evidence that the defendant began the manufacture of shoddy in December, 1874, in an old mill, and had no scales until March, 1876, and that Harris, one of the plaintiffs, knew how he was situated. There was no evidence of any deficiency in weight in the stock sold by other parties to the defendant and manufactured by him. It is also to be noted that the plaintiffs offered no evidence to explain the deficiencies in weight which were detected by actual weighing, or to show that they were accidental or exceptional.

The plaintiffs asked the court to rule, in substance, that the defendant could recover, under his declaration in set-off, only for such deficiencies as he had proved by actually weighing the stock or the products, and that the evidence would not warrant the jury in finding any larger sum in his favor. The judge read the request to the jury, but qualified it as follows: "I do instruct you that you must not proceed upon conjecture and suspicion, but I do not instruct you that the mode suggested is the only way that the defendant might get at the loss or short weight. If upon a fair consideration of all the evidence in the case, including the auditor's report, you are able to ascertain the loss or short weight, in any other way than that suggested in the plaintiffs' request for instruction, you are at liberty to do so. And if you find that there was an intentional purpose on the part of the plaintiffs to defraud the defendant by short weight on the items of the account they have sued on, then that is a fact you may properly consider in connection with the whole evidence in the case, in deciding whether there was short weight on the other goods previously sold to the defendant by the plaintiffs, and which are included in the defendant's declaration in set-off." We are of opinion that the ruling requested was properly refused, and that the case was submitted to the jury under correct instructions.

The evidence in the case would justify the conviction in the minds of the jury that the plaintiffs, throughout their dealings with the defendant, had been acting under a deliberate, systematic scheme to defraud him by overmarking the weight of the goods sold to him. It is true that the exact amount of which the defendant has been defrauded cannot now be ascertained.

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But it was properly left to the jury to ascertain from all the evidence what deficiency in weight was proved. They did not act merely upon conjecture and suspicion. The amounts of the deficiency in the numerous bales which were weighed, indicating something like uniformity in the fraud practised, and the estimates of the defendant and his workmen as to the shrinkage or deficiency in the production, would materially aid the jury in determining the extent to which the defendant was defrauded in the bales which he did not weigh. Taking all the evidence and the inferences to be fairly drawn from it, we cannot say that the jury may not reasonably have been satisfied that the defendant was defrauded to the amount which by their verdict they allowed him upon his account in set-off.

The only other exception taken was to the ruling of the court permitting the defendant to ask the plaintiff Harris, upon cross-examination, whether he was the partner of the plaintiff, C. Herrman, whether Adolph Herrman was not his real partner, and how much capital he put into the partnership?

We do not deem it necessary to discuss the question, whether, under the pleadings in this case, it was competent for the defendant to deny the partnership of the plaintiffs as alleged by them. If we assume that it was not competent, yet the bill of exceptions does not show that the plaintiffs were in any way prejudiced by the questions. The answers are not given, and as the verdict was for the plaintiffs, it is clear that they were not aggrieved by the error, if there was one.

Exceptions overruled.

RUFUS B. HOLDEN *vs.* JAMES W. JENKINS & others.

Worcester. October 2. — 21, 1878. AMES & SOULE, JJ., absent.

The St. of 1877, *c.* 163, providing that "any signature to a written instrument declared on or set forth as a cause of action," shall be taken as admitted unless its genuineness is specially denied, does not apply to the signature of a witness to an attested promissory note, required by the Gen. Sts. *c.* 155, § 4, to take the note out of the statute of limitations.

CONTRACT against the defendants as copartners under the firm name of the Barre Boot Company, upon the following

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promissory note: "Barre, June 26th, 1857. $935. For value received the Barre Boot Company promise to pay to the order of Rufus B. Holden nine hundred thirty-five dollars on demand with interest annually.

"Witness, James Miller, Treas.
"Nathan Woods." for Barre Boot Co.

Writ dated June 23, 1877. Answer: 1. A general denial; 2. The statute of limitations.

At the trial in the Superior Court, before *Bacon*, J., without a jury, the plaintiff produced in evidence the note declared upon, and contended that, under the pleadings, the signatures of the maker and attesting witness were admitted; and that he was not obliged to offer any further evidence in proof of the signature or of the attestation of the note; but the judge ruled that the omission of the defendants to file a special denial of the genuineness of the signature to the note, under the St. of 1877, *c.* 163,* was an admission of the maker's signature only; that it was still incumbent upon the plaintiff to prove the signature of the attesting witness; required the plaintiff to offer such proof; and allowed the defendants, against the plaintiff's objection, to introduce evidence tending to show that the signature of the attesting witness, who was deceased, was not in his handwriting, but that the same had been fraudulently written upon the note since its delivery. The judge found that the signature of the witness was not genuine; and ordered judgment for the defendants. The plaintiff alleged exceptions.

H. C. Hartwell, for the plaintiff.

W. S. B. Hopkins, for the defendants.

MORTON, J. The signature intended by the St. of 1877, *c.* 163, is the signature of the party sought to be charged thereby, which creates against such party a cause of action or a ground of defence. The signature of an attesting witness to a promissory note does not, properly speaking, form part of the cause of ac-

* "Any signature to a written instrument declared on or set forth as a cause of action or ground of defence or set-off, in an action at law, shall be taken as admitted, unless the party sought to be charged thereby shall file in court, within the time allowed for answer, a special denial of the genuineness of such signature, and a demand that the party relying thereon shall prove the same at the trial." [April 26, 1877.]

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tion against the maker. The attestation changes the character of the contract by annexing to it the incident that an action on it will not be barred until the lapse of twenty years. Gen. Sts. *c.* 155, § 4. It has somewhat the same effect as a seal, giving to the note in some respects the character of a specialty. Suppose a plaintiff to declare on an instrument, alleging it to be under seal, and the defendant to file an answer denying each and every allegation of the declaration, and setting up the statute of limitations. Would the defendant's failure to file a special denial of the genuineness of his signature preclude him from showing that the instrument declared on, and, in fact, signed by him, was not under seal when he signed it, but that a seal had been fraudulently put upon it since, to avoid the bar of the statute of limitations? This would be to hold that the admission implied by the statute was an admission, not only of the genuineness of the signature, but also that he made the contract as the plaintiff has set it out. This would be going further than the language or purpose of the statute would justify.

The design of the statute was to save the party who relies upon a written instrument the trouble and expense of proving the signature, unless the adverse party, whose signature it is, will take the responsibility of a special denial of its genuineness, this being a fact especially within his personal knowledge.

The language of the statute implies that the signature intended is the signature of the party whose duty it is to file the denial. The signature of an attesting witness is not of this character. The fact of attestation, like a seal or a partial payment, extends the time of limitation, but does not, properly speaking, charge the maker with any liability. If the signature to the note is denied, it is necessary to call the attesting witness, because he is the witness selected by the parties. If it is admitted, the attestation is immaterial, and need not be proved unless the maker pleads the statute of limitations; then it is necessary to prove it, not to establish the cause of action, but by way of replication to the plea of the statute of limitations.

Under the system of special pleading, the course of pleading was, that the plaintiff declared on the note according to its tenor, the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff replied that the note was signed in the presence of

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an attesting witness, upon which allegation issue was joined. *Faulkner* v. *Jones*, 16 Mass. 290. *Smith* v. *Dunham*, 8 Pick. 246.

The admission of the genuineness of the defendant's signature, implied by the statute, might relieve the plaintiff of the necessity of calling the subscribing witness merely for the purpose of proving the signature; but we are of opinion that it does not relieve the plaintiff of the burden of proving, in reply to the plea of the statute of limitations, the material fact that the defendant signed the note in the presence of an attesting witness. The ruling of the Superior Court, being to this effect, was correct. *Exceptions overruled.*

M. M. STOWE *vs.* FRANCIS BUTTRICK.

Worcester. October 2. — 21, 1878. AMES & SOULE, JJ., absent.

A contract, by which a person is appointed keeper of attached property by the attaching officer, is not unlawful as between the parties to it; and, in an action by the keeper against the officer, for the value of services rendered under the contract, it is no defence that the officer has no claim against another for the performance of such services.

In an action upon a *quantum meruit* for services rendered to another upon his express request, the compensation is to be determined by the value of the services, and not by the amount of benefit which the person requesting them receives.

CONTRACT upon an account annexed for services rendered as keeper of certain property attached by the defendant, a deputy sheriff. Answer: 1. A general denial; 2. That the contract was illegal and void.

At the trial in the Superior Court, before *Bacon*, J., without a jury, the plaintiff put in evidence a written appointment of himself as keeper of personal property of one Winchester, which had been attached by the defendant on a writ against Winchester. He testified that there was no agreed price for the services to be rendered; that he kept possession of the property, and devoted his whole time thereto for two hundred and three days; that he was then directed by the defendant to deliver the keys and possession to Winchester, as the case in which the attachment was made was settled; and that his services were worth

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two dollars per day. No question was made as to the sufficiency of the writ against Winchester, or that he was owner of the property, or that the defendant attached the same and put the plaintiff in possession.

This was all the evidence; and the defendant contended that, on these facts, the plaintiff could not recover, on the ground that the contract proved was illegal and void.

The judge so ruled; and also ruled that upon these facts the plaintiff could not recover upon a *quantum meruit;* and found for the defendant. The plaintiff alleged exceptions.

W. S. B. Hopkins & G. H. Whitney, for the plaintiff, were stopped by the court.

G. A. Torrey, for the defendant.

LORD, J. The ruling of the presiding judge, that the contract which the plaintiff seeks to enforce is void because of illegality, cannot be sustained. *Cutter* v. *Howe*, 122 Mass. 541, upon which the ruling is supposed to be based, admits of no such interpretation. That case decides only that a fee charged by an officer, which the law does not authorize, cannot be taxed as legal costs in the suit. If, for the purpose of keeping goods of very trifling bulk, an officer should hire an entire building which was wholly unnecessary, the rent of such building would not properly be taxable costs in the suit; but it has not been decided that a lease thus taken by an officer would be void, or that the lessor could not recover rent upon it. If the officer should attempt to charge such rent as part of the cost of service, or if the lessor should undertake to hold the adverse party for such charge, there would be an analogy to the case of *Cutter* v. *Howe*. There is nothing in the case at bar to show that the plaintiff was at any time or in any respect a wrongdoer. His claim is that he performed a service at the request of the defendant, for which he is entitled to compensation. The service was not an illegal service, as between the plaintiff and the defendant; and if it should happen that, for the performance of such service, the defendant has no claim upon another, it is the misfortune of the defendant, and not the fault of the plaintiff. The right of the plaintiff to recover for services rendered at the defendant's request does not depend upon the right of the defendant to recover from another for the services rendered. There is nothing in the case to show

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that the defendant had not hired the building, in which the goods were stored, of Winchester, the defendant in the writ on which the property was attached, or that he was not in possession of it with Winchester's express or implied assent. In such case, the officer would not be a trespasser. There is no presumption of law or fact that an officer, in the service of legal process, is a trespasser, nor that a contract into which he enters with another, for any purpose not in itself unlawful, is void. Nor is the position of the defendant tenable, that, inasmuch as he received no benefit from the services of the plaintiff, the plaintiff cannot recover. In an action upon a *quantum meruit* for services rendered to another upon his express request, the value of the services is not to be determined by the amount of benefit which the party requesting them receives. If A. hires B. to perform a particular service in a particular mode, the compensation is to be determined by the value of the services, and not by the benefit which A. derives from it. *Exceptions sustained.*

SAMUEL F. WHITNEY *vs.* CHARLES W. HOUGHTON.

Worcester. October 3. — 21, 1878. AMES & SOULE, JJ., absent.

In an action for breach of warranty in the sale of a cow, the time of the sale was in dispute, and the defendant was allowed to put in evidence that, in an interview with a witness on a day prior to the time when the plaintiff contended that the cow was sold, the fact that he had then sold the cow to the plaintiff was a subject of conversation, but the witness was not allowed to testify to what was said. *Held*, that the evidence was incompetent, as allowing the defendant to put in his own declaration that he had then sold the cow to the plaintiff.

CONTRACT for breach of warranty in the sale of a cow.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff's evidence tended to show that he bought the cow of the defendant on May 6, 1874; that the defendant then warranted the cow to be sound and all right; and that there was a breach of this warranty. The defendant contended that the sale was made about the middle of April, 1874; and that the cow was then sound.

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The defendant called one Cummings as a witness, who testified that in the year 1874 he was an assessor of taxes in the town of Harvard, where the defendant lived; that on May 2, 1874, he went to take an account of the defendant's taxable property for the purpose of assessing him; and that, in looking over the defendant's property for this purpose, he saw the cow in question at the defendant's barn; that the fact that the defendant had sold the cow to the plaintiff was a subject of conversation between himself and the defendant at the time. The defendant was also permitted to testify to the same fact. The plaintiff objected to the admission of this testimony; but the judge permitted the witnesses to testify to this fact, only as bearing upon the time of the sale, and whether it took place before or after May 2, 1874; and did not permit them to testify to what was said, except as above. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

F. A. Gaskill, for the plaintiff.

F. P. Goulding, for the defendant.

ENDICOTT, J. At the trial, the defendant was allowed to prove that, in an interview with a witness on May 2, the fact that he had then sold the cow to the plaintiff was the subject of conversation. This evidence had a material bearing upon the question, when the sale took place, which was in dispute between the parties. The presiding judge admitted the fact that there was such a conversation, but refused to allow the witnesses to testify to what was said. But the character of the conversation cannot be changed by thus describing it. From the fact that there was such a conversation, it is evident that the defendant had stated to the witness that he had sold the cow to the plaintiff, and she was no longer his property. The witness was an assessor of Harvard, who visited the defendant on that day for the purpose of taking an account of the defendant's taxable property, and it does not appear that he had any knowledge whatever of the sale, except that derived from his conversation with the defendant. It was not competent therefore for the defendant to put in his own declarations made to a third party. *Marcy* v. *Barnes*, 16 Gray, 161, 163. *Lucas* v. *Trumbull*, 15 Gray, 306. *Blood* v. *Sanderson*, 4 Gray, 586. *Woodward* v. *Leavitt*, 107 Mass. 453. *Nourse* v. *Nourse*, 116 Mass. 101.

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In *Earle* v. *Earle*, 11 Allen, 1, two witnesses were called to prove what took place on a particular occasion, and the fact that they then had a conversation on a certain subject was held to be competent, on the ground that it would tend to show that they were testifying to the same occasion. In *Commonwealth* v. *Sullivan*, 123 Mass. 221, relied on by the defendant, a witness, who testified to a sale of intoxicating liquor, was allowed, for the purpose of fixing the time when the sale took place, to state that he testified to the same sale before the magistrate. But neither of these cases has any application to the case at bar.

Exceptions sustained.

CHARLES R. JOHNSON *vs.* GEORGE S. BATTELLE.

Worcester. October 19. — 21, 1878. AMES & SOULE, JJ., absent.

Under a will containing the following clause: "All the rest, residue and remainder of my estate, real, personal or mixed, of whatever name or nature, I devise and bequeath to A. for his comfort, support and maintenance during his natural life, and at the decease of A., whatever of said estate remains unexpended by him, then I give and bequeath the same to B.," A. takes an estate for life, with a power to sell and convey in fee, if necessary for his support and maintenance; and the remainder over is contingent on its not becoming necessary to exercise that power.

CONTRACT for breach of the covenants in a deed of land from the defendant to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the plaintiff, in the sum of $1200, to this court, on appeal, on an agreed statement of facts in substance as follows:

The deed from the defendant to the plaintiff contained the following covenants: "And I do hereby for myself and my heirs, executors and administrators, covenant with the said grantee and his heirs and assigns, that I am lawfully seised in fee simple of the granted premises, that they are free from all incumbrances, that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators, shall warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons."

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The defendant's title was acquired under the will of his wife, which, after providing for debts and expenses of last sickness, contained the following clause: "All the rest, residue and remainder of my estate, real, personal or mixed, of whatever name or nature, I devise and bequeath to my beloved husband, George S. Battelle, for his comfort, support and maintenance during his natural life, and at the decease of my said husband, whatever of said estate remains unexpended by him, then I give and bequeath the same to my nieces, to wit: to Elizabeth P. Converse, Ella M. Bartlett and Anna R. Brigham, to be divided equally between them, share and share alike."

The defendant was also appointed executor of the will, and empowered to perform all lawful acts and things necessary to carry the same into effect, according to its true intent and meaning.

The estate conveyed to the plaintiff was substantially all that was acquired by the will, and is all the property the defendant has. The net income of the property will not exceed $100 per annum, and is insufficient to support the defendant. The nieces mentioned in the will are still living.

S. Utley, for the plaintiff, cited *Harris* v. *Knapp*, 21 Pick. 412; *Spooner* v. *Lovejoy*, 108 Mass. 529; *Kimball* v. *Sullivan*, 113 Mass. 345; *Lyon* v. *Marsh*, 116 Mass. 232; *Ladd* v. *Whitney*, 117 Mass. 201; *Whitcomb* v. *Taylor*, 122 Mass. 243; *Bamforth* v *Bamforth*, 123 Mass. 280.

F. T. Blackmer, for the defendant.

GRAY, C. J. By the will, the defendant took an estate for life, with a power to sell and convey in fee, if necessary for his support and maintenance, and the remainder over was contingent on its not becoming necessary to exercise that power. The facts agreed showing such necessity, the deed from the defendant to the plaintiff passed an absolute title. *Lyon* v. *Marsh*, 116 Mass. 232. *Bamforth* v. *Bamforth*, 123 Mass. 280. *Smith* v. *Snow* 123 Mass. 323. *Gibbins* v. *Shepard*, *post*, 541.

Judgment for the defendant.

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ELISHA C. LEONARD, assignee, *vs.* WILLIAM F. NYE.

Bristol. Oct. 25, 1877. — Oct. 21, 1878. LORD & SOULE, JJ., absent.

Money paid by the United States, according to a decision of the Court of Commissioners of Alabama Claims, under the U. S. St. of June 23, 1874, to the owner of a cargo destroyed by one of the insurgent cruisers, with respect to which it was determined by the Tribunal of Arbitration at Geneva, constituted by virtue of the Treaty of Washington of 1871, that Great Britain had failed to fulfil her duties as a neutral government, belongs to an assignee of such owner, appointed under the bankrupt act of 1867, after the destruction of the property and before the making of the treaty; and may be recovered from the owner by the assignee in an action for money had and received.

The U. S. St. of February 26, 1853, requiring assignments of any claim upon the United States to be executed in the presence of two witnesses, and after the allowance of the claim, the ascertainment of the amount due, and the issue of a warrant for its payment, applies only to voluntary assignments *in pais*, and not to assignments by operation of law in bankruptcy proceedings.

A sale by an assignee in bankruptcy, under order of the court, of "certain choses in action, consisting of certain bills, notes and accounts, nominally of the value of about $1000, but in reality nearly worthless," does not include the right of the assignee in money afterwards awarded to the bankrupt by the Court of Commissioners of Alabama Claims for the previous destruction of his property by an insurgent cruiser.

CONTRACT for money had and received. At the trial in the Superior Court, before *Aldrich*, J., without a jury, the following facts appeared:

On February 19, 1868, the defendant was duly adjudged a bankrupt under the laws of the United States by the District Court of the United States for the District of Massachusetts, and on March 13, 1868, the plaintiff was duly chosen assignee of the defendant's estate, and a legal assignment thereof was made to him by that court.

On October 6, 1868, the plaintiff presented a petition to the District Court, representing that, "in order to settle his accounts with said estate, it is necessary to dispose of certain choses in action, consisting of certain bills, notes and accounts, nominally of the value of about one thousand dollars, but in reality nearly worthless," and therefore asking leave to sell the same at private sale, with or without public notice, as he might judge expedient. Upon the recommendation of a register in bankruptcy, the District Court passed an order granting this petition. And the plaintiff sold those assets as above described.

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On January 14, 1875, the defendant presented to the Court of Commissioners of Alabama Claims a petition for damages sustained by the destruction of merchandise belonging to him on board the whaling barque Abigail, destroyed with her cargo on May 27, 1865, by the insurgent cruiser Shenandoah, after her departure from Melbourne, Australia. Upon that petition, that court, on April 5, 1876, awarded to the defendant the sum of $1088.35 and interest, amounting in all to $1507.61, which, less $188.45, the expense of recovering the same, was paid to the defendant on September 15, 1876. The plaintiff filed no petition in that court; and this claim was not disclosed by the defendant in his schedule in bankruptcy, and was not known to the plaintiff until after the award, and he then demanded the sum of the defendant.

The plaintiff put in evidence the Treaty of Washington between the United States and Great Britain, promulgated July 4, 1871; the award of the Tribunal of Arbitration at Geneva, made September 18, 1872; and the act of Congress of June 23, 1874, creating the Court of Commissioners of Alabama Claims. The defendant cited the Treaty of Washington; the several acts of Congress relating to the Court of Commissioners and to the payment of its awards; the act of Congress of February 26, 1853, concerning the transfer of claims against the United States; the publications of the Department of State of the United States relating to the Geneva Arbitration, and the debates in Congress regarding the Geneva Award; and it was agreed that they might be referred to at the argument.

Upon this evidence, the defendant asked the court to rule that the plaintiff could not recover; that the claim described in the defendant's petition to the Court of Commissioners of Alabama Claims did not pass by the assignment and proceedings in bankruptcy; and that, if it did so pass, the plaintiff had sold and assigned the same. But the judge declined so to rule; and ruled that that claim did pass by the assignment in bankruptcy, and the plaintiff could recover; and found, and ordered judgment, for the plaintiff in the sum of $1386.88. The defendant alleged exceptions.

C. W. Clifford, for the defendant.

E. L. Barney, for the plaintiff.

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GRAY, C. J. This case presents the question, whether money paid by the United States according to a decision of the Court of Commissioners of Alabama Claims, under the act of Congress of June 23, 1874, to the owner of a cargo destroyed in 1865 by one of the insurgent cruisers, with respect to which it was determined by the award made at Geneva by the Tribunal of Arbitration, constituted by virtue of the Treaty of Washington of 1871, that Great Britain had failed to fulfil her duties as a neutral government, belongs to an assignee of such owner, appointed under the bankrupt act of 1867, after the destruction of the property, and before the making of the treaty.

The leading American authority upon this subject is *Comegys* v. *Vasse*, 1 Pet. 193. In 1802, Vasse, who had previously been an underwriter on ships and cargoes, the property of citizens of the United States, captured and carried into the ports of Spain and her dependencies, and who had received abandonments from the owners and had paid them the losses caused by such captures, was proceeded against as a bankrupt under the act of Congress of April 4, 1800, and an assignment of his property was made to Comegys and others as his assignees in bankruptcy. By the treaty with Spain of 1819, by which Florida was ceded to the United States, the United States renounced all claims of their citizens upon the government of Spain for such captures, and undertook to make satisfaction, to an amount not exceeding five millions of dollars, for the same as ascertained by commissioners appointed by the President to receive, examine and decide upon the amount and validity of all such claims. 8 U. S. Sts. at Large, 258, 260. In 1821, Congress authorized such commissioners to be appointed, conformably to the stipulations of the treaty. 3 U. S. Sts. at Large, 639. In 1824, the assignees in bankruptcy of Vasse received from the treasury of the United States about nine thousand dollars, being the sum awarded by the commissioners on account of the captures and losses of the vessels and cargoes insured by Vasse; and Vasse afterwards brought an action of assumpsit against his assignees to recover this sum.

The Supreme Court of the United States, in an opinion delivered by Mr. Justice Story, unanimously held, 1st. That the decision of the commissioners was not conclusive of the right of

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the assignees to hold against the bankrupt the money awarded to them; 2d. That the abandonment by the owners of the ships and cargoes to Vasse, the underwriter thereon, assigned not only the property itself, or its proceeds if restored after an unjust capture, but also any compensation awarded by way of indemnity therefor, and, consequently, that the sum awarded by the commissioners belonged to Vasse, if it had not passed by assignment from him; and also by a majority of the court (overruling the decision of Mr. Justice Washington on the circuit, reported 4 Wash. C. C. 570,) decided that this right of Vasse had passed by the assignment in bankruptcy to his assignees, and therefore he could not maintain the action against them.

The grounds of the decision upon the first point may be summed up thus: The authority of the commissioners and the effect of their award were limited to ascertaining and determining the validity and amount of the original claims for damages and injuries against Spain. The determination of that question did not require the commissioners, and the powers conferred upon them did not permit the summoning in of the necessary parties and witnesses to enable them, to adjust the conflicting rights of different citizens in the fund awarded, or to decide who was the original legal, as contradistinguished from the equitable, owner, or whether the present ownership was in assignees, personal representatives, or *bonâ fide* purchasers. But the rights of any claimant, as well as of all other persons, in the sum awarded to him by the commissioners, were left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. 1 Pet. 212, 213. A similar decision was afterwards made by the same court as to an award of the commissioners under the treaty with France of 1831, and the act of Congress of 1832 to carry that treaty into effect. 8 U. S. Sts. at Large, 430. 4 U. S. Sts. at Large, 574. *Frevall* v. *Bache*, 14 Pet. 95.

The reasons assigned in *Comegys* v. *Vasse* for the decision upon the second point bear so strongly upon the case before us, as to make it proper to state them more fully, which cannot be better done than by quoting some passages from the opinion.

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"In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment." "The law gives to the act of abandonment, when accepted, all the effects, which the most accurately drawn assignment would accomplish." "Whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters." Both upon authority and upon principle, "the right to the compensation in this case was in its nature assignable, and passed by abandonment to Vasse." "The right to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the use of the ultimate sufferer. If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him."

"It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain, nor the government of the United States, is suable in the ordinary courts of justice, for debts due by either. Yet who will doubt that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right, both to the justice of his own and the foreign sovereign. The theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with right, is not admissible." "The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal

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captures, by an appeal to the justice of the government. It was never understood, that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice." "It recognized an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain." 1 Pet. 213–217.

The court pointedly condemned, as unsatisfactory, the reasoning of Sir Thomas Plumer, M. R., in *Campbell* v. *Mullett*, 2 Swanst. 551, so far as it tended to support a different view; and cited, as authorities establishing its own conclusion, the decision of Lord Chancellor Hardwicke in *Randal* v. *Cockran*, 1 Ves. Sen. 98, and those of Chief Justice Kent and his associates in the Supreme Court of New York, in *Gracie* v. *New York Ins. Co.* 8 Johns. 237, and of the Supreme Court of Pennsylvania in *Watson* v. *Ins. Co. of North America*, 1 Binn. 47.

Mr. Vesey's brief but explicit report of *Randal* v. *Cockran*, which was decided in 1748, is as follows: "The King having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures; the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers; who thereupon brought the present bill.

"Lord Chancellor was of opinion, that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored *in specie*, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid; although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they see who was owner; nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made." 1 Ves. 98.

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As observed by Mr. Justice Story, "This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive, that the assignment by abandonment is competent not only to pass the property itself, or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord Hardwicke was the stronger, because the indemnity was awarded to the party by his own sovereign, and not by the sovereign of the captors." 1 Pet. 215. And again: "The case of *Randal* v. *Cockran* stands upon the true ground. It considers the right of indemnity as travelling with the right of property. In that case it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the Crown, out of funds provided by reprisals. So, perhaps, the commissioners thought; but Lord Hardwicke decided otherwise." 1 Pet. 217.

The very point, which Mr. Justice Story here suggests might have been taken in *Randal* v. *Cockran*, was in fact urged in the precisely similar case of *Blaauwpot* v. *Da Costa*, 1 Eden, 130, decided ten years later by Lord Keeper Henley, (afterwards Lord Chancellor Northington,) but the report of which, not having been published in England until shortly before the decision in *Comegys* v. *Vasse*, does not appear to have been known to the Supreme Court at the time of that decision. In *Blaauwpot* v. *Da Costa*, underwriters in Amsterdam, in 1729, issued a policy of insurance to De Paz on a ship, which was soon after seized by the Spaniards, before the declaration of war between Great Britain and Spain, and carried into Havana and condemned, and the underwriters, in 1730, paid the amount of the policy to the assured. In 1741, the King of Great Britain, by proclamation, ordered a distribution of all prizes, taken before the declaration of war, in equal moieties between the sufferers and the captors; and in 1746, under a commission for the distribution of such prizes, a sum greater than the amount of the policy was paid to the executors of De Paz as a compensation for the loss of the ship. The underwriters brought a bill in equity against such executors, to recover the amount of the policy. Mr. Eden's report, which is from the manuscripts of Sir Thomas Sewell, (afterwards Master of the Rolls,) who was one of the counsel for

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the executors, shows that they argued, "If this is in the nature of salvage, the underwriters must undoubtedly have the benefit of it. But it is not so; it is a grant of the King; a royal bounty to British sufferers, and not an act of justice. The commissioners for the distribution were only allowed to pay the difference to the sufferers. The plaintiffs as foreigners could not have claimed under the commission." But the Lord Keeper granted the relief prayed for, saying, "I am of opinion that upon the policy, and the peril happening, and the payment of the money by the underwriters, the whole rights of the assured vested in them. The assured had this right of restitution vested in them against the Spanish captors, which was afterwards prosecuted by the Crown by reprisals. Satisfaction having been made in consequence of that capture, I think the plaintiffs are entitled to that benefit; and that it was received by the executors of Elias De Paz in trust for them. The defence of the plaintiffs being foreigners, and as such not entitled to any benefit, is a fallacy; they stand in the place of British subjects, and have therefore in this court the same rights as British subjects. The capture is the origin of that right, which belongs to the plaintiffs by relation, as claiming under one of the sufferers. As to the nature of the salvage, it was so much saved out of the hands of the Spaniards by means of the interposition of the Crown; it was so understood by the Crown. It was to be considered as a retribution to the underwriters as lessening the loss incurred by the capture." 1 Eden, 131, 132.

The case at bar does not present for adjudication any question of the rights of insurers, and the quotations from the opinions of Lord Hardwicke and Lord Northington and of the Supreme Court of the United States have not been made with a view to such a question, but because they state, more clearly and forcibly than any other authorities with which we are acquainted, the nature of the right of the owner of property destroyed by the act of a foreign government, in a sum afterwards awarded to him by his own government by way of compensation for such loss, either out of reprisals made by the latter upon the former, or out of a fund set apart by the latter for the purpose, in accordance with a treaty by which it has renounced all claims of its citizens upon the former; and because they fully establish the position that

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the right in a sum so awarded is an interest legally capable of being assigned by the owner of the property, even before his own government has taken any steps toward securing to him an indemnity for his loss. See also *Dickenson* v. *Jardine*, L. R. 3 C. P. 639, 643; *Sheppard* v. *Taylor*, 5 Pet. 675; *Milnor* v. *Metz*, 16 Pet. 221, 227; *Rogers* v. *Hosack*, 18 Wend. 319, 332; *Clark* v. *Wilson*, 103 Mass. 219, 222; *Williamson* v. *Colcord*, 13 Bankr. Reg. 319.

By the Treaty of Washington of 1871, the British government expressed its regret "for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels;" and it was agreed that all claims "growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama Claims,'" should be referred to a Tribunal of Arbitration; that the tribunal should first determine, as to each vessel separately, whether Great Britain had, by act or omission, failed to fulfil any of the duties set forth in the rules prescribed in the treaty itself or recognized by the principles of international law, and should certify such fact as to each of the vessels; that the tribunal, in case of finding any such failure of duty, might, if it should think proper, "proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it;" and, in case of the tribunal's finding such failure of duty and not awarding a sum in gross, it was agreed that a board of assessors should be appointed, "to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the arbitrators;" and the two nations engaged to consider the result of the findings of the Tribunal of Arbitration, and of the board of assessors, should such board be appointed, "as a full, perfect and final settlement of all the claims hereinbefore referred to," and that every such claim, whether presented to the tribunal or the board, or not, should be afterwards considered and treated as finally settled and barred.

The Tribunal of Arbitration determined that Great Britain had failed to fulfil her duties as a neutral government, with re-

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spect to the Alabama and the Florida and their tenders, and to the Shenandoah after her departure from Melbourne on February 18, 1865; and therefore awarded a sum in gross of fifteen and a half millions of dollars, as the indemnity to be paid by Great Britain to the United States for the satisfaction of all claims referred to the consideration of the tribunal.

By the act of Congress of March 3, 1873, it was enacted that this sum, when paid by Great Britain, should be paid into the treasury, and used to redeem, so far as it might, the public debt of the United States, and that an amount equal to the debt so reduced should be invested in bonds of the United States to be held subject to the further disposition of Congress. That act did but provide for an investment of the fund until Congress could direct how it should be disposed of. The United States have doubtless the sovereign power of determining what application shall be made of money received under a treaty for injuries caused to the property of their citizens by the wrongful or negligent acts of another nation, and are not liable to suit in any court or tribunal, except as they have consented to be so sued. *Comegys* v. *Vasse*, 1 Pet. 216. *United States* v. *Clarke*, 8 Pet. 436, 444. *Rustomjee* v. *The Queen*, 1 Q. B. D. 487. The amount was afterwards received from Great Britain, and paid into the treasury of the United States, and invested according to the directions of that act.

By the act of Congress of June 23, 1874, a court, entitled the Court of Commissioners of Alabama Claims, was created for the adjudication and disposition of the money so received into the treasury. This act provided that in all claims presented before the court the person prosecuting the claim should be deemed the complainant and the United States the respondent; and that the court should consider the evidence offered by the respective claimants and in opposition thereto. §§ 3, 7.

By § 11, it was made the duty of the court "to receive and examine all claims, admissible under this act, that may be presented to it, directly resulting from damage caused by the so-called insurgent cruisers Alabama, Florida, and their tenders, and also all claims, admissible under this act, directly resulting from damage caused by the so-called insurgent cruiser Shenandoah after her departure from Melbourne on the eighteenth day

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of February, eighteen hundred and sixty-five; and to decide upon the amount and validity of such claims, in conformity with the provisions hereinafter contained, and according to the principles of law and the merits of the several cases;" and all claims were required to be verified by the oath of the claimant, and to be filed within a certain time, or else to be deemed to be finally and conclusively waived and barred.

By § 12, the court was to allow claims for such loss or damage only as the party injured, his assignees or legal representatives, should not have received compensation or indemnity for, from any insurer or otherwise; and was to allow no claim for or in behalf of any insurer, either in his own right, or as assignee or otherwise, in the right of the party insured, except for the excess of such claimant's losses, during the late rebellion, in respect to war risks, over the sum of his premiums upon such risks; and no claim in favor of any insurance company not existing at the time of the loss under the laws of some state of the United States, or in favor of any person not entitled, at the time of his loss, to the protection of the United States, or who did not, at all times during the rebellion, bear true allegiance to the United States.

By §§ 14, 15, the Secretary of the Treasury was directed to pay the judgments of that court, or, if they should exceed the amount of money received from Great Britain, then to distribute that amount, in ratable proportion, among the parties in whose favor such judgments should be rendered, or their legal representatives, in full satisfaction and discharge of such claims and judgments; such payments to be made out of any unappropriated money in the treasury, and, as made from time to time, the bonds issued by the United States, under the act of 1873, to be cancelled and extinguished to an equal amount.

The claims for the destruction of property of citizens of the United States by the Alabama and the Florida, and by the Shenandoah after her departure from Melbourne, through the violation by Great Britain of her international duty, were claims for which the owners of the property destroyed were justly entitled to compensation from Great Britain, although they could not obtain their rights in the ordinary course of judicial proceedings, but only by petition to the British government, or through

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the interposition of their own government. Compensation for those losses was demanded by the United States from Great Britain as a matter of right, and as such was awarded by the decision of the Tribunal of Arbitration created by the treaty between the two governments. The act of Congress for the adjudication and disposition of the moneys received from Great Britain, pursuant to that decision, provided for their application to the payment of claims directly resulting from the damage caused by those insurgent cruisers; and the sum awarded to this defendant by the commissioners appointed under that act of Congress was upon such a claim. It must therefore be treated as awarded and paid to him by reason of his interest in property so destroyed, and of his right to compensation for its destruction, and as capable of passing by an assignment from him, in any form recognized by law, though made after the destruction of the property and before the award of indemnity.

In the case at bar, as in those in the Supreme Court of the United States and in the English Court of Chancery, already quoted, the duties required of the commissioners, and the powers conferred upon them, are confined to ascertaining the validity and amount of the claims for damages incurred by the destruction of vessels and cargoes; and the investigation and determination of conflicting rights, under assignments or otherwise, in the sums awarded by the commissioners, are left to the ordinary course of judicial proceedings. The object of § 12 is to define and limit the claims which may be recovered against the United States under this act. Whether and how far its provisions may affect suits between underwriters and assured, to enforce rights arising out of the contracts between them, is not before us. It is quite clear that it does not affect interests of assignees claiming under an assignment, whether voluntary or by operation of law, as to which Congress has made no regulation.

The question then remains, whether the right to the money received by the defendant was included in the previous assignment of his estate in bankruptcy.

The decision upon this point in *Comegys* v. *Vasse* was based mainly upon §§ 5 and 6 of the bankrupt act of 1800, which provided that the commissioners in bankruptcy should take into their possession "all the estate, real and personal, of every nature

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and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever," and "all deeds and books of account, papers and writings, belonging to such bankrupt;" and should assign to the assignees in bankruptcy "all and singular the said bankrupt's estate and effects aforesaid, with all muniments and evidences thereof." 2 U. S. Sts. at Large, 23. Mr. Justice Story, in delivering judgment, said: "These words are certainly very general and comprehensive. 'All the estate, real and personal, of every nature and description, in law or equity,' are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the right devolved upon Vasse, by the abandonment, would, in case of his death, have passed to his personal representative, and, when the money was received, be distributable as assets. Why then should it not be assets in the hands of the assignees? Considering it in the light in which Lord Hardwicke viewed it, as an equitable trust in the money; it is still an interest, or, at all events, a possibility coupled with an interest." 1 Pet. 218, 219.

Although the learned judge also referred to the provisions of § 18, respecting the surrender by and the examination of the bankrupt with regard to effects and papers in which he was in any way interested or entitled, or had or might "have or expect any profit, possibility of profit, benefit or advantage whatsoever," as very material, yet his observation, "If there were any doubt upon the meaning of the language of the fifth section, we think it is cleared up and illustrated by that of the present," as well as his previous commentary on § 5, and the subsequent decisions in *United States* v. *Hunter*, 5 Mason, 62, and 5 Pet. 173, and in *Milnor* v. *Metz*, 16 Pet. 221, giving the like effect to assignments under state insolvent laws, clearly show that an assignment, in general terms, of all a debtor's property and estate, for the benefit of his creditors, must be considered as including the right in question.

The words of the recent bankrupt act are more full and particular in this respect than those of the act of 1800. It provides

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that the judge or register shall assign and convey to the assignee in bankruptcy "all the estate, real or personal, of the bankrupt, with all his deeds, books and papers relating thereto," "and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee," excepting only furniture and other necessary articles, not exceeding in all $500 in value, wearing apparel, military uniform, arms and equipments, and property "exempted from attachment, or seizure, or levy on execution," by the laws of the United States, or of the state of the bankrupt's domicil. This last exception clearly has regard to such property as, if not specifically exempted, would be capable of being seized or taken on attachment or execution, and has no application to rights or interests which from their nature are incapable of being so seized or taken. The act then goes on to provide that "all rights in equity, choses in action, patents and patent-rights and copyrights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking or detention of or injury to the property of the bankrupt, and all his rights of redeeming such property or estate; with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made; shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee." U. S. St. March 2, 1867, § 14. U. S. Rev. Sts. §§ 5044, 5045, 5046.

In the light of the decisions under former bankrupt and insolvent laws, we cannot doubt that these words were intended to include every kind of vested interest, legal or equitable, in, and all claims, whether founded in contract or in tort, relating to or growing out of property — which the debtor himself, if not adjudged a bankrupt, could in any way assign, or could prosecute in any form, either in the ordinary courts of justice, or otherwise.

The act of Congress of February 26, 1853, requiring assignments of any claim upon the United States to be executed in the

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presence of two witnesses, and after the allowance of the claim, the ascertainment of the amount due and the issue of a warrant for its payment, manifestly applies only to voluntary assignments *in pais*, and not to assignments by operation of law and in the course of judicial proceedings.

It is equally clear that the interest of the bankrupt in the property destroyed by the insurgent cruiser, and his claim against any individual or government for compensation for such destruction, were not included in the "choses in action, consisting of certain bills, notes and accounts, nominally of the value of about one thousand dollars, but in reality nearly worthless," which the assignee in bankruptcy has sold under an order of the District Court of the United States.

No reference was made at the argument, under the leave reserved in the bill of exceptions, to the publications of the Department of State or the debates in Congress, relating to the Geneva Arbitration and Award.

The result is, that the money paid by the United States to the defendant may be recovered in this action as money had and received to the plaintiff's use. *Law* v. *Thorndike*, 20 Pick. 317. *Lee* v. *Thorndike*, 2 Met. 313. *Exceptions overruled.*

EBENEZER JONES *vs.* JAMES W. DEXTER & others.

Bristol. Oct. 23, 1877. — Oct. 21, 1878. LORD & SOULE, JJ., absent.

A partner may maintain a bill in equity against his copartner and a third person, to recover his proportion of moneys paid to the defendants by the United States in accordance with a decision of the Court of Commissioners of Alabama Claims, under the U. S. St. of June 23, 1874, for property of the partnership destroyed by an insurgent cruiser, although, after the destruction of the property and before the making of the Treaty of Washington of 1871, the plaintiff was adjudged an insolvent debtor under the laws of this Commonwealth, and all his property was duly assigned to his assignee, if all the debts proved against the plaintiff's estate in insolvency, or existing at the time of the assignment, have been paid, satisfied and discharged, and the assignee has signified his assent in writing to the maintenance of the bill in the name of the debtor.

BILL IN EQUITY by one partner, Jones, against his copartner, Dexter, and two other persons, to settle the affairs of a partnership.

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The bill alleged that the partnership, at the time of its dissolution in 1861, owned a share in the whaling barque Ocean Rover, then at sea, and in her outfits and catchings, and that in 1862, upon the voyage, the vessel and her cargo were destroyed by the insurgent cruiser Alabama, and this share was not insured; and that pursuant to a decision of the Court of Commissioners of Alabama Claims, the sum of $1564 had been paid to Dexter in respect of his and the plaintiff's share in the vessel and outfits, and the sum of $55,068 to the other two defendants in respect of her total earnings and catchings, to be by them distributed among her owners, and praying for an injunction, an account and further relief.

To this bill Dexter filed a plea, stating that in 1864, under the insolvent laws of the Commonwealth then in force, the plaintiff, upon his own application, was adjudged an insolvent debtor, William S. Taber was appointed his assignee, and all the debtor's property was duly assigned and transferred to him, whereby Taber was and still is, to the exclusion of the plaintiff, entitled to any property or money which, in the settlement of the affairs of the partnership, might be found due or owing to the plaintiff.

The plaintiff then, with the assent of the defendants and by leave of court, amended his bill by alleging the adjudication of insolvency and the appointment of the assignee, and that the plaintiff in 1865 obtained a certificate of discharge, and that all debts proved against him in insolvency had been long since satisfied, paid and discharged, and no liabilities, existing or inchoate against him at the time of his insolvency, had any validity or existence; that the assignee had long since terminated the duties of his trust and ceased to be interested in the property or affairs of the plaintiff, and was in no way entitled to the amount to be found due or owing to the plaintiff upon a settlement of the affairs of the partnership, and had never elected to take or accept the ownership of the claim set out in the bill; and that any claim or title to redress, relief or indemnity, for loss suffered by destruction of the vessel, was not in its nature such as would pass to an assignee in insolvency, and that such assignee had no rights under the decision of the Court of Commissioners of Alabama Claims. The amendment also alleged that Taber joined in the bill to confirm the statement with respect to the proceed-

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ings in insolvency and to disclaim all interest in the subject matter in controversy, and was signed by Taber as well as by the plaintiff's solicitor.

Dexter filed a plea to the amended bill, relying upon the matters set forth in his former plea. The plaintiff moved that the plea be set aside for insufficiency; and the case was reserved by *Endicott*, J., upon the bill and amended bill, the pleas and this motion, for the consideration of the full court.

T. M. Stetson & F. B. Greene, for the plaintiff.

G. Marston, for the defendant.

GRAY, C. J. It would seem that the assignment under the insolvent laws vested in the assignee in insolvency the title to the insolvent debtor's share in the partnership assets, including the sums awarded by the Court of Commissioners of Alabama Claims. Gen. Sts. *c.* 118, § 44. *Barker* v. *Goodair*, 11 Ves. 78. *Murray* v. *Murray*, 5 Johns. Ch. 60, 78. *Gray* v. *Bennett*, 3 Met. 522, 525. *Comegys* v. *Vasse*, 1 Pet. 173. *United States* v. *Hunter*, 5 Mason, 62, and 5 Pet. 193. *Leonard* v. *Nye*, *ante*, 455. But, upon the allegations of the amended bill, all the debts proved against the estate in insolvency, or existing at the time of the assignment, have been paid, satisfied and discharged, and the debtor is, in equity at least, entitled to the surplus assets remaining in the hands of the defendants, and the assignee, even if he cannot be considered to have been made a party to the bill in regular form, has clearly signified in writing his assent to the truth of these statements and to the maintenance of the bill in the name of the debtor. Under these circumstances, there is nothing in the provisions of the insolvent laws, or in the practice of courts of chancery, which prevents the bill being so maintained. Gen. Sts. *c.* 118, § 94. *Stone* v. *Hubbard*, 7 Cush. 595. *Wearing* v. *Ellis*, 6 De G., M. & G. 596. *Plea overruled.*

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MASON FISHER & another *vs.* STEPHEN T. FRAPRIE.

Bristol. October 22, 1878. ENDICOTT & LORD, JJ., absent.

A defendant in an action at law filed an answer containing an answer in abatement and an answer to the merits. The judge overruled the answer in abatement, and ordered the case to be tried on the merits, and a verdict was returned for the defendant. *Held*, that the plaintiff had no ground of exception, the defendant having the right to answer over if the answer in abatement was overruled in matter of law, and it being within the discretion of the judge, under the Gen. Sts. *c.* 129, § 40, to allow him to answer over if it was overruled in matter of fact.

CONTRACT on an account annexed for use and occupation. The defendant filed the following: "Answer in abatement and answer. And now comes Stephen T. Fraprie and answers in abatement the nonjoinder of Thomas Fairbanks, John Gifford, alias Gilfoy, James Cameron, Smith K. Law, William Greene and Joseph Eaton, all of Fall River in said county, who are jointly liable with the defendant in the cause of action declared on, and ought to be joined with him as parties defendant in said case, and this he is ready to prove; and, in no ways departing from his said answer in abatement, or waiving the same, the defendant says that he denies each and every allegation of the plaintiff's writ and declaration."

At the trial in the Superior Court, it appearing that the defendant, if liable at all, was liable with other persons, known to him, whose names were disclosed at the trial, but who were not named in the answer in abatement, *Brigham*, C. J., overruled the answer in abatement, and ordered the trial to proceed on the merits; and to this order the plaintiffs alleged exceptions, which, after trial on the merits and verdict for the defendant, upon contradictory evidence, and under instructions not otherwise excepted to, were allowed by the judge.

W. H. Peirce, for the plaintiffs.

H. K. Braley, for the defendant, was not called upon.

BY THE COURT. The answer filed by the defendant contained both an answer in abatement and an answer to the merits; and the validity of either was not affected by their being pleaded together. *Claflin* v. *Thayer*, 13 Gray, 459. The decision in the Superior Court, whether in law or fact, upon the answer in abatement, was indeed final. Gen. Sts. *c.* 115, § 7. *Wildes* v.

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Marshall, 117 Mass. 311. But if the answer in abatement was overruled as matter of law, the defendant had the right to answer over; if as matter of fact, he might do so at the discretion of the judge. Gen. Sts. *c.* 129, § 40. *Young* v. *Gilles*, 113 Mass. 34. The plaintiff has therefore no just ground of exception to the order of the judge allowing a trial on the answer to the merits. *Exceptions overruled.*

PHILIP W. FRANK & others *vs.* JEREMIAH O'NEIL & another.

Bristol. October 22. — 23, 1878. ENDICOTT & LORD, JJ., absent.

In an action to recover the price of intoxicating liquors sold in another state, the mere fact that the plaintiff knew, at the time of the sale, that the defendant was a grocer and liquor dealer in this Commonwealth, does not necessarily prove knowledge on the part of the plaintiff that the defendant intended to sell the liquors again illegally.

CONTRACT upon an account annexed for intoxicating liquors sold and delivered on January 22, 1875. Answer: 1. A general denial; 2. Payment. The defendants also filed a declaration in set-off for money paid to the plaintiffs in 1874, according to an account annexed.

At the trial in the Superior Court, before *Brigham*, C. J., the defendants proved that in July, 1874, they purchased of the plaintiffs intoxicating liquors in the State of New York, and paid for such liquors in September, 1874, the sum of $260.90; and that, at the time of the purchase, the plaintiffs knew that the defendants were grocers and liquor dealers in this Commonwealth.

The judge ruled that the above facts, and the fact that the liquor was sold by the defendants in violation of law, would not authorize the jury to apply the payment of the $260.90 as a payment for liquors afterwards sold to and received by the defendants from the plaintiffs, not in violation of law, on the ground that the first sale of liquor was in violation of law, and the $260.90 paid therefor might in some form of action, and in some form of pleading, be recovered back from the plaintiffs by the defendants.

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The jury returned a verdict for the plaintiffs for the full amount claimed; and the defendants alleged exceptions.

J. W. Cummings, for the defendants.

M. G. B. Swift, for the plaintiffs, was not called upon.

By the Court. The mere fact that the defendants were grocers and liquor dealers in this Commonwealth, and that the plaintiffs knew it, (which is all that the instruction assumes,) did not necessarily prove knowledge on the part of the plaintiffs that the defendants intended to sell the liquors again illegally, which was essential to invalidate the sale between these parties. *Kellogg* v. *Moore*, 2 Allen, 266. *Ely* v. *Webster*, 102 Mass. 304.

Exceptions overruled.

Ann F. Smith *vs.* Maria Slack, administratrix.

Bristol. October 23. — 24, 1878. Endicott & Lord, JJ., absent.

In an action against an administrator for services claimed to have been rendered his intestate by a woman who, as he contended, had lived in adultery with the intestate, a witness testified that when the widow of the intestate made a claim in the Probate Court for an allowance, the defendant objected to it on the ground that she had deserted her husband several years before his death. *Held*, that this evidence did not authorize the defendant to prove by the witness that the widow, in answer to this objection, said that she left her husband because of his adultery with the plaintiff.

Contract upon an account annexed for services rendered to the defendant's intestate as housekeeper from 1861 to 1875. The answer contained a general denial, and alleged that, during the whole of the time covered by the declaration, the plaintiff cohabited with the intestate in adultery.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff's evidence tended to show that the services declared for were rendered and for a lawful consideration; and the evidence of the defendant tended to show the cohabitation as set up in the answer. It appeared in evidence that, during the whole of the period that the plaintiff lived with the intestate, he had a wife alive, living separate and apart from him. She was not present at the trial.

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The plaintiff called in rebuttal one Stanley as a witness, and asked him if he knew Mary Ann Slack, the wife of the intestate. He replied that he did. He was then asked, without objection by the defendant, whether she had made a claim for an allowance as widow out of the estate, and whether the defendant had not objected to the allowance, on the ground that she was not entitled to it because of her desertion of her husband for fourteen years before his decease. The witness answered in the affirmative. The defendant then asked the witness what answer Mrs. Slack made to this objection. The plaintiff objected to the question. The defendant contended that the witness would say that her answer was, that she left her husband on account of his adultery and cohabitation with the plaintiff. The judge sustained the plaintiff's objection, and excluded the question.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the above ruling.

J. Daggett & J. Brown, for the defendant.

W. H. Fox, for the plaintiff.

BY THE COURT. The evidence of the statements of the defendant may have been competent as tending to prove an admission by her that the intestate's wife was absent at the time of the services rendered him by the plaintiff. But the introduction of that evidence clearly did not warrant the proof of statements of the widow, who was not a party to this action. Her statements were mere hearsay and incompetent.

Exceptions overruled.

EDWARD HERBERT *vs.* GEORGE W. BRONSON & trustee.

Bristol. October 25, 1878. ENDICOTT & LORD, JJ., absent.

Future wages, to be earned under an engagement not existing at the time, are not capable of being assigned.

TRUSTEE PROCESS. Writ dated December 31, 1877, and served on January 1, 1878. The city of Fall River, summoned as trustee, answered that at the date of service upon it, it had in its hands belonging to the defendant the sum of $248. James

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Murphy, Jr., appeared as claimant of the funds in the hands of the trustee by virtue of an assignment, dated April 9, 1877, to him from the defendant, of "all claims and demands I now have, and all which, at any time between the date hereof and the ninth day of April next, I may and shall have against the city of Fall River, for all sums of money due and for all sums of money and demand which, at any time between the date hereof and the said ninth day of April next, may and shall become due to me, for services as school teacher."

At the trial in the Superior Court, before *Gardner*, J., without a jury, it appeared that, at the date of the assignment, the defendant was employed as a school teacher by the city, under a contract, from September, 1876, to June 30, 1877; that on September 1, 1877, the defendant was hired by a new contract from that date until June 30, 1878; and that nothing was due the defendant on September 1, 1877, upon his prior contract, but that he had then been paid in full. It was admitted by the plaintiff that the assignment was founded on a valid consideration; that it was duly recorded; and that there was due the assignee from the defendant a larger sum than was in the hands of the trustee. The claimant contended that he was entitled to all sums earned by the defendant while in the employ of the city, during the year covered by the assignment.

The judge found as a fact, that the contract, under which the defendant was employed when the assignment was made, terminated on June 30, 1877, and that a new contract was entered into between the defendant and the trustee on September 1, 1877; ruled that the assignment did not cover funds earned since September 1, 1877, as against the trustee process; and ordered the trustee to be charged. The claimant alleged exceptions.

H. A. Dubuque, for the claimant.

H. K. Braley, for the plaintiff, was not called upon.

By the Court. It is well settled that money to be earned hereafter under a new engagement is not assignable. *Mulhall* v. *Quinn*, 1 Gray, 105. *Hartley* v. *Tapley*, 2 Gray, 565. *Twiss* v. *Cheever*, 2 Allen, 40. *Exceptions overruled.*

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JOHN MAHON & others *vs.* FRANCIS D. BLAKE & others.

Bristol. October 25. — 26, 1878. ENDICOTT & LORD, JJ., absent.

If goods are sent by a common carrier to be delivered to A., the carrier is not justified in delivering them at the store of B., although A. has guaranteed the rent of the store, and has been compelled to pay it.

An allegation, that a common carrier agreed "to deliver to E. T. Learned" certain goods, is supported by evidence that the carrier clearly understood him to be the person for whom the goods were intended, although the name marked thereon was "E. D. Leonard."

A count in contract for non-delivery may be joined with a count in tort for the misdelivery of goods, if there is doubt as to the legal effect of the facts relied upon to maintain the action.

CONTRACT against common carriers doing business under the name of the Kinsley Express Company. The declaration alleged that on or about May 21, 1875, the plaintiffs, by their agents, delivered to the defendants, at Boston, certain cases of boots and shoes, which the defendants undertook and agreed to carry to Fall River, and to deliver to E. T. Learned, of said Fall River; that the defendants neglected and refused to deliver said goods and chattels to said Learned, though often requested so to do, and still neglect and refuse so to do; that the defendants owed the plaintiffs for said goods and chattels $182.70. There was also a count in tort for the conversion of the said boots and shoes. Trial in the Superior Court, before *Gardner*, J., who allowed a bill of exceptions in substance as follows:

It was admitted that the plaintiffs sent the goods mentioned in the declaration, by express from Lynn to Boston, marked "Dr. E. D. Leonard, Fall River, Mass.," and that the defendants received them at Boston, and carried them to Fall River. The plaintiffs testified that by "Dr. E. D. Leonard" they intended one Dr. E. T. Learned, a physician of Fall River; and there was evidence that the defendants had said they had no doubt that Dr. E. T. Learned was intended, and that no such person as Dr. E. D. Leonard, or any one of a similar name, was known to live in Fall River; that Dr. E. T. Learned lived on Highland Avenue, and had an office on North Main Street, some distance from 81 South Main Street, where W. B. Hunt, Learned's son in law, had a store, and where the evidence tended to show that the goods were delivered.

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It appeared that, prior to the sending of the goods, the plaintiffs had no conversation or communication in any way with Dr. Learned. The latter denied any knowledge of the sale, and testified that he did not know of the sending of the goods in his name till a long time after the transaction, and never received them or any of their proceeds; that he had no connection in a business way with Hunt, and never authorized Hunt in any way to use his name, and was not himself engaged in the boot and shoe business.

W. B. Hunt testified that he gave the order to the plaintiffs' agent, and told him to send the goods to S. T. Hunt, his wife, 81 South Main Street, Fall River, Mass.; that he did not offer the name of Dr. Learned, for whom he had no authority to act, and gave no instruction to send the goods to him; and that he went to the defendants' office in Fall River, and directed that the goods should be left at his store.

The defendants offered evidence tending to show that Hunt was Learned's agent in all matters relating to the shoe store; that Learned was in reality the owner of Hunt's store; and that the relations between them were such that a delivery at the store was a sufficient delivery to Learned. It was admitted that Learned had guaranteed, and afterwards, by reason of such guaranty, paid the rent, for about a month, of Hunt's store; that he guaranteed several bills for goods purchased by Hunt, and had supplied him with about $2300 capital; that he was in the store almost every day, and had a chattel mortgage, taken as security for the $2300, on all the stock and goods in the store at the time the goods in controversy were delivered, but not including these goods. It also appeared that Hunt went away about a month after the goods were delivered, and Learned took possession of the store, sold the stock and fixtures, and, after paying the bills guaranteed, turned over the balance to Hunt's wife.

The defendants requested the judge to instruct the jury as follows: "1. The count in trover cannot be maintained against the defendants on the declaration in this action, as the plaintiffs have not proved a demand on the defendants for the property alleged to have been converted, previous to the commencement of the action. 2. The jury are to judge whether or not the relations of Dr. Learned with his son in law were such that a deliv-

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ery at the store No. 81 South Main Street was a sufficient delivery. It is not necessary that the goods be delivered at the house of the consignee; delivery at any place under his control or authority is sufficient. Delivery at a store for which he pays the rent is sufficient. 3. The plaintiffs cannot recover on the declaration, as there is a variance between that and the proof, the declaration alleging that the goods were marked 'E. D. Leonard,' and it now appears that there was no such person; and if the goods were sent to a consignee not in existence, the defendants cannot be held for non-delivery."

The judge fully instructed the jury upon all parts of the case, including the title to the goods and the sufficiency of the delivery by the defendants, and, at the plaintiffs' request, instructed them that there was no evidence of a sale of the goods by the plaintiffs to Learned personally, to which instructions no exception was taken by the defendants.

The judge declined to give the first instruction requested by the defendants; but instructed the jury, that, if the defendants delivered these goods to a person who had no right to receive them, or at a place unauthorized, and this put it out of their power to deliver them to the person entitled to them, an action of trover could be maintained to recover their value without any previous demand; but that this form of action could not be maintained for mere non-delivery without a previous demand.

The judge gave the second instruction requested, with the exception of the last sentence, which he declined to give; and also instructed the jury that it was the duty of the defendants to deliver the goods to the consignee in person, or at his dwelling-house, or usual place of business, or to his duly authorized agent, or at some place under his authority and control, provided he had there a servant or agent authorized to receive them; but the mere fact that he guaranteed the payment of the rent of a store, and under such guaranty was compelled to pay it, would not of itself justify the defendants in delivering the goods at such store; and also gave instructions, not objected to, as to what would constitute the relation of principal and agent between Hunt and Learned.

The judge declined to give the third instruction requested, but instructed the jury that if the goods were sent to a person not

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in existence, then the defendants could not be held for non-delivery; but if the name in the declaration and that marked on the goods were so nearly alike that the defendants understood that the goods were meant for Dr. E. T. Learned, and there was no uncertainty as to the person intended, and there was no other person in Fall River whom they could reasonably have been intended for, and they were in fact meant for him, then there was no variance.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

M. Reed, for the defendants.

J. M. Morton, Jr., for the plaintiffs, was not called upon.

By the Court. None of the positions taken in the argument for the defendants can be maintained.

1. The bill of exceptions expressly states that no exception was taken by the defendants to the instruction that there was no evidence of a sale of the goods by the plaintiffs to Dr. Learned personally.

2. The question of the place at which the defendants might deliver the goods to the consignee was submitted to the jury under apt and sufficient instructions; and it was rightly ruled that the mere fact that the consignee guaranteed the payment of the rent of the building, and was thus compelled to pay it, would not of itself justify the defendants in delivering the goods there.

3. There was no variance. The allegation that the defendants agreed to deliver to E. T. Learned was supported by evidence that they clearly understood him to be the person for whom the goods were intended, although there was an inaccuracy in his name as marked on the goods.

4. The plaintiffs might properly join a count in contract for non-delivery, and a count in tort for misdelivery of the goods, if in doubt which was the legal effect of the facts upon which they relied to maintain their action. Gen. Sts. *c.* 129, § 2, *cl.* 5. *Sullivan* v. *Fitzgerald*, 12 Allen, 482. *Atwater* v. *Clancy*, 107 Mass. 369.

Exceptions overruled.

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JOHN BOURNE *vs.* HENRY T. BUFFINGTON.

Bristol. October 25. — 26, 1878. ENDICOTT & LORD, JJ., absent.

At the beginning of a trial, the defendant's counsel verbally requested the plaintiff's counsel to produce a bill of sale to the plaintiff, without mentioning its date, and he answered that the plaintiff did not have it in his possession. The presiding judge was of opinion that seasonable notice to produce the original bill of sale had not been given, and excluded secondary evidence thereof. *Held*, that the defendant had no ground of exception.

On the issue whether a sale was in fraud of creditors, no proceedings in insolvency or bankruptcy having been instituted, it is not erroneous to refuse to instruct the jury that if the debtor was in failing circumstances the sale was invalid, or to omit to give any instructions on the effect of insolvency or bankruptcy.

REPLEVIN. The answer denied the plaintiff's title, and alleged that the goods were the property of William Hayes, and were attached by the defendant, a constable of Fall River, while in the possession of Hayes, by a creditor of his, and that any transfer from Hayes to the plaintiff was fraudulent and designed to impede the insolvent laws of Massachusetts and the bankrupt laws of the United States.

At the trial in the Superior Court, before *Gardner*, J., the plaintiff put in evidence a bill of sale from Hayes to himself of the property in question, under which he testified that he took possession, and that Hayes had possession of the property at the time of the attachment as his agent.

Upon cross-examination, the plaintiff testified that Hayes made another bill of sale to him of the same, or a portion of such property, three years before, and that he immediately made a bill of sale of the same to the wife of Hayes, but he could not fix the date of such prior bills of sale, saying that he had the one given to him recorded in the city clerk's office in Fall River.

The defendant called the city clerk of Fall River to produce the records of these former bills of sale, and offered the records in evidence. The plaintiff objected to their admission, on the ground that the law did not require the registration of bills of sale, and that no written notice had been given to him to produce the originals; but the plaintiff's counsel admitted that, at the commencement of the trial, the defendant's counsel made a verbal request for him to produce certain bills of sale, but with-

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out mentioning their dates of execution, and that he answered that the plaintiff did not have them in his possession.

It was in evidence that the plaintiff resided at Newport, Rhode Island. The trial took place at Fall River. The judge ruled that the records of the city clerk possessed no higher authority than any other true copies of the bills of sale would have; that there was no presumption that the plaintiff had in his possession any of the bills of sale, except the one given to him by Hayes; that to enable the defendant to introduce secondary evidence of the contents of this bill of sale, he must have seasonably notified the plaintiff to produce it; that he was not satisfied that such notice had been given; that in relation to the other bill or bills of sale, no sufficient reason had been given for the introduction of secondary evidence of their contents; and excluded the records and the testimony of the city clerk in relation thereto.

The plaintiff testified that Hayes was indebted to him at the time he took the bill of sale of the property; that he understood that Hayes was financially embarrassed when he gave the bill of sale; and that it was given because he insisted upon payment of his debt. Hayes was never declared a bankrupt or insolvent, and there was no evidence that any bankruptcy or insolvency proceedings had ever been commenced either by himself or by his creditors.

The defendant asked the judge to instruct the jury, that if they believed Hayes was in failing circumstances at the time he made the bill of sale relied on, then they must find for the defendant. The judge refused so to rule, and gave no instruction on insolvency or bankruptcy.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. H. Peirce, for the defendant.

M. Reed, for the plaintiff, was not called upon.

By the Court. Assuming the bills of sale made three years before to be material to the issue on trial, no error is shown in the exclusion of secondary evidence of them. Whether sufficient notice to produce the originals had been given, was a question of fact for the decision of the presiding judge. The answer of the plaintiff's counsel to the request made at the beginning of the trial, "that the plaintiff did not have them in his posses-

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sion," might well be understood to mean that he did not then have them with him.

The defendant not claiming under proceedings in bankruptcy or insolvency, no error is shown in the refusal or omission of instructions. *Exceptions overruled.*

FALL RIVER RAILROAD COMPANY *vs.* THOMAS J. CHASE.

Bristol. October 22. — 30, 1878. ENDICOTT & LORD, JJ., absent.

If a railroad corporation is dissatisfied with an award of county commissioners, assessing damages for the taking of land for its railroad, and applies for a jury to assess the damages, it has the right, under the Gen. Sts. c. 43, § 41, to discontinue its petition for a jury and accept the award of the commissioners, upon such terms as the court may order; and if it files such discontinuance, the respondent, not having applied for a jury and entered into a recognizance for the payment of costs, in accordance with the Gen. Sts. c. 43, § 24, is not entitled to insist upon a trial by jury.

PETITION to the Superior Court, at September term 1876, for the reassessment by a jury of the damages occasioned to the respondent by the taking of his land for the petitioner's railroad.

On August 2, 1876, the county commissioners, on the petition of Chase, had assessed such damages at the sum of $94. Chase did not file any petition for reassessment by a jury; but on October 13, 1876, in answer to the petition of the railroad company, alleged that he was aggrieved by and dissatisfied with the estimate and award of the county commissioners, and demanded a trial by jury.

On September 18, 1877, the corporation filed a discontinuance of its petition. On October 24, Chase notified the corporation that, notwithstanding such discontinuance, he should claim that the case should go on. On November 19, the case was reached in the order of the docket, and *Brigham*, C. J., ruled, against the protest and exception of the counsel for the corporation, that it should proceed to trial. The trial resulted in a verdict against the company for $200, which was accepted by the court; and the company alleged exceptions.

T. M. Stetson, for the railroad company.

J. C. Blaisdell, for Chase.

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GRAY, C. J. Either party, dissatisfied with the award of the county commissioners, assessing damages for the taking of land for a railroad, may apply for a jury to assess the damages. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107. *Miller* v. *County Commissioners*, 119 Mass. 485. Sts. 1870, *c.* 75; 1873, *c.* 261; 1874, *c.* 372, § 68. But he is not entitled to a jury, unless he makes his application therefor within a year from the award of the commissioners, and enters into a recognizance for the payment of costs. St. 1874, *c.* 372, § 67. Gen. Sts. *c.* 43, § 24. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 123, 124.

A petition for a jury is not strictly an appeal, and does not vacate the award of the commissioners. The petitioner had the right, at any stage of the proceedings, upon such terms as the court should order, to waive a trial by jury and accept the award of the commissioners. Gen. Sts. *c.* 43, § 41. The respondent, not having himself filed a petition for a jury and entered into a recognizance, had no right to insist upon a trial by jury. The St. of 1874, *c.* 372, § 80, does not extend his right in this respect, but is limited to cases in which proceedings upon his own application have been quashed or defeated for informality.

The case is not like one in which the defendant has filed a declaration in set-off upon a distinct cause of action, and which cannot therefore be discontinued by the plaintiff without his consent. Gen. Sts. *c.* 130, § 21. It is more analogous to an ordinary action at law, in which the plaintiff has the right to become nonsuit at any time before trial. *Burbank* v. *Woodward*, 124 Mass. 357.

Upon discontinuance of the petition for a jury, the landowner has ample remedies to enforce the award of the commissioners, by warrant of distress, or by bill in equity to restrain the corporation from entering upon or using the land. St. 1874, *c.* 372, §§ 67, 69, 72. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 126. *Elwell* v. *Eastern Railroad*, 124 Mass. 160.

Exceptions sustained.

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MICHAEL J. KILLEA *vs.* HENRY H. FAXON & others.

Suffolk. Nov. 19, 1877. — Oct. 17, 1878. ENDICOTT & LORD, JJ., absent.

In an action for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a coppersmith, putting up gutters on a building, while he was, as alleged in the declaration, in the employ of the defendants, the evidence tended to show that the defendants were repairing the building, and employed a skilful carpenter to superintend the whole job; that, when the time came for putting on the gutters, A., one of the defendants, told the carpenter that he wanted a staging put up, and the staging, for the sole purpose of putting on the gutters, was erected under the direction of the carpenter, who used his own brackets to support it; that the brackets were insecurely fastened to the building; that, on the next day, A. ordered the gutters of a coppersmith, and directed him to send a man to put them up; and that the plaintiff was thus sent, and, when he arrived, was directed by A. where to go to work upon the staging, which fell, causing the injuries. *Held*, that the only negligence was that of the carpenter, a fellow-servant, and that the action could not be maintained.

TORT for personal injuries caused by the fall of a staging, upon which the plaintiff was at work, while he was, as alleged in the declaration, in the employ of the defendants. Trial in the Superior Court, before *Gardner*, J., who ruled that, upon the plaintiff's evidence, he could not maintain the action, and, by consent of parties, before verdict, reported the case for the determination of this court. If, upon the evidence, the action could not be maintained, judgment was to be entered for the defendants; otherwise, the case was to stand for trial. The nature of the evidence appears in the opinion.

L. W. Howes & F. A. Dearborn, for the plaintiff.

A. French, for the defendants.

MORTON, J. There was evidence at the trial tending to show that the staging was improperly constructed and unsafe, because the brackets, upon which it was supported, were insecurely fastened to the building. Upon this point, there was evidence proper to be submitted to the jury.

The defendants were repairing a building belonging to the Quincy Reform Club. For the purposes of this case, we treat them as subject to the same liabilities as if they were the owners of the building. They employed one Higgins, a carpenter, to superintend the whole job. When the time came for putting

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on the gutters, Faxon, one of the defendants, told Higgins that he wanted a staging put up, and the staging was erected under the direction of Higgins, who used his own brackets, for the sole purpose of putting on the gutters. Faxon, on the next day, ordered of Loring, a coppersmith, some copper gutters for the building, and directed him to send a man to put them up. Loring sent the plaintiff, and, when he arrived at the building, Faxon was there, and directed him where to go to work. There was no evidence of any negligence, except the negligence of Higgins, in constructing the staging. The question is, whether the relations of the parties were such that the defendants are responsible to the plaintiff for such negligence.

On the one hand, is the familiar rule that one who enters the service of another takes upon himself the risks incident to the employment, including the risk of the negligence of fellow-servants employed in the same service. On the other hand, is the equally well settled rule, that, if a master undertakes to furnish structures or instruments with which the servant is to work, the master is bound to use due care in providing them, and he is responsible, if, through his negligence or the negligence of other servants employed to furnish them, they are unsuitable. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. *Arkerson* v. *Dennison*, 117 Mass. 407.

We are of opinion that this case falls within the first rule. There was no evidence which would justify the jury in finding that either of the defendants undertook to furnish a staging for the plaintiff, or to assume the risk of its safety. It was like the ordinary case where a man, in building or repairing a house, employs various servants in different departments of labor. Neither of the defendants retained any charge or direction of the work of putting up the staging, but entrusted it to Higgins. He and the plaintiff were fellow-servants employed in the same service, and each took the risk of the negligence of the other. It is not contended that there was any evidence of negligence on the part of the defendants in the employment of Higgins, it appearing that he was a skilful and competent carpenter. It follows that the plaintiff has proved no negligence for which the defendants, or either of them, are responsible.

Judgment for the defendants.

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JAMES MULCHEY *vs.* METHODIST RELIGIOUS SOCIETY & others.

Suffolk. Nov. 20, 1877. — Oct. 17, 1878. COLT & LORD, JJ., absent.

In an action of tort against a religious society and against A. and B., its agents, for personal injuries occasioned to the plaintiff by the fall of a staging, upon which he was standing while engaged in painting the ceiling of a church belonging to the society, it appeared that A. and B., acting as a committee and as the authorized agents of the society, made a contract with C., in whose employ the plaintiff was, to paint the whole of the inside of the church building for a gross sum, and not subject to the direction or control of the defendants, except as to the quality of the work and the time within which it was to be performed; that the society undertook to erect and remove the staging to be used by C., and, acting through the same agents, employed D., a carpenter and builder of their own selection, by a contract for a gross sum, and not subject to the direction or control of the defendants, to erect and remove the staging and to supply all the material and labor required for that purpose; and that C. did not and could not know, from the appearance or from examination of the staging, whether it was or was not strong enough for his workmen to go upon to paint the church. There was no evidence that the defendants took any part in erecting the staging, or in directing its erection, beyond making the contract with D.; or that they at any time made any inspection of the staging; or that they were guilty of any negligence in employing D. to erect it. *Held*, that the society, through its authorized agents, had accepted and used the staging, and had in effect invited and induced C. and his workmen to come upon it to paint the church, and was liable to the plaintiff for an injury from the dangerous condition of the staging which was not apparent to him and which was caused by negligence in its construction. *Held, also*, that the society and its agents could not be sued jointly in this action.

GRAY, C. J. This is an action of tort, brought against a religious society and against Barber and Sleeper, to recover for injuries suffered by the plaintiff by reason of the fall of a staging upon which he was standing while engaged in painting the ceiling of a church belonging to the society.

By a contract made by the society, acting through Barber and Sleeper as its committee and authorized agents, with Needham, in whose employ the plaintiff was, the society employed Needham to paint the whole of the inside of the building, for a gross sum, and not subject to the direction or control of the defendants, except as to the quality of the work and the time within which it was to be performed; and the society undertook to erect and remove the staging to be used by the painters.

The society, acting through the same committee, employed Curtis, a carpenter and builder of their own selection, by a con-

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tract for a gross sum, and not subject to the direction or control of the defendants, to erect and remove the staging and supply all the materials and labor required for this purpose.

There was evidence tending to show that Needham did not and could not know, from the appearance or from examination of the staging, whether it was or was not strong enough for his workmen to go upon to paint the church. There was no evidence that the defendants took any part in erecting the staging, or in directing its erection, beyond making the contract with Curtis; or that they at any time made any inspection of the staging; or that they were guilty of any negligence in employing Curtis to erect it. The sole ground upon which the plaintiff seeks to recover is, that the staging erected by Curtis was insufficient.

The defendants requested the judge to instruct the jury that if Curtis was employed by an entire contract, for a gross sum and in an independent operation, and not subject to the direction and control of his employers, he was not the defendants' servant, and they were not responsible for his negligence or for that of persons employed by him; and that in this action of tort, in the nature of an action on the case, the only ground of claim against the society arose from the fact that Barber and Sleeper were its authorized agents to have the work done of painting the church; and that the party injured by the act or negligence of the agents, there being no evidence of any action of the principal other than the acts of the agents, might elect to sue either, but could not maintain an action against both jointly.

The judge declined to give the instruction requested; and instructed the jury that, inasmuch as the defendants assumed the duty of furnishing this staging upon which this work was to be done by Needham and his workmen, they undertook to furnish a safe staging for the purpose, and it made no difference to the plaintiff in this case whether they did it by letting out the job to a contractor or by employing persons to do the work by the day; that they agreed to furnish a staging, had a staging built, and offered that staging to Needham to work upon as a suitable staging, and if it was defective in its construction in any such way or degree as to show that it was not built with that measure of prudence and care which a prudent man would exercise in

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building such a staging in such a place and for such a purpose, and if in consequence of such negligent construction the plaintiff was hurt, he was entitled to recover; and that the verdict, if for the plaintiff, should be against all the defendants. The jury returned a verdict against all the defendants, and they alleged exceptions.

The plaintiff, not being employed, controlled or paid by the defendants, would seem not to be their servant so that they would be liable for his acts, or their liability to him be governed by the rules applicable as between master and servant. *Johnson* v. *Boston*, 118 Mass. 114. The defendants might not be liable for an injury occasioned by the negligence of the contractor, Curtis, or his servants, in the course of building the staging and before its completion. *Hilliard* v. *Richardson*, 3 Gray, 349. *Forsyth* v. *Hooper*, 11 Allen, 419. *Conners* v. *Hennessey*, 112 Mass. 96. But after it had been completed by the contractor, and accepted by the society, the society would be liable if through negligence in its construction it had fallen upon and injured the property of another. *Gorham* v. *Gross*, *ante*, 232.

In the present case, the society, through its authorized agents, had accepted and used the staging, and had in effect invited and induced Needham and his workmen to come upon it to paint the church, and was liable to any of them who suffered injury from the dangerous condition of the staging which was not apparent to them and which was caused by negligence in its construction. *Elliott* v. *Pray*, 10 Allen, 378. *Gilbert* v. *Nagle*, 118 Mass. 278. *Pickard* v. *Smith*, 10 C. B. (N. S.) 470. *Indermaur* v. *Dames*, L. R. 1 C. P. 274, and L. R. 2 C. P. 311. *Holmes* v. *Northeastern Railway*, L. R. 4 Ex. 254. *Coughtry* v. *Globe Woollen Co.* 56 N. Y. 124.

But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact, nor in

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legal intendment, the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly. *Parsons* v. *Winchell*, 5 Cush. 592. *Hewett* v. *Swift*, 3 Allen, 420. *Holmes* v. *Wakefield*, 12 Allen, 580. The plaintiff's counsel having suggested at the argument that, if the court should be of this opinion, the plaintiff would move to discontinue as against Barber and Sleeper, it is ordered that such discontinuance be entered, and thereupon the *Exceptions overruled.*

H. W. Paine & C. F. Choate, for the defendants.

G. A. Somerby, for the plaintiff.

ROYAL BANK OF LIVERPOOL *vs.* GRAND JUNCTION RAILROAD AND DEPOT COMPANY & others.

Suffolk. March 27, 28, 1877. — Oct. 19, 1878. COLT & SOULE, JJ., did not sit.

In 1856, the G. company, of which A. was treasurer and B. a director, became hopelessly insolvent. In April, 1862, A. obtained a judgment against the company for about $26,000, upon which execution was issued, levied and satisfied by the sale of its franchise for the term of ninety-nine years to the E. company, which was chartered in March, 1862, and in which A. and B. were stockholders, A. owning at the first issue nearly all the shares of stock. In July, 1862, B., having been authorized thereunto at the annual meeting of the stockholders of the G. company, held in May, 1862, made a conveyance of all its real estate, railroad, franchise, rights and privileges, and the right of redeeming the same to the E. company in consideration of $13,085; and at a subsequent annual meeting of the G. company, held in May, 1865, the conveyance was ratified and confirmed as its free act and deed. In 1866, the B. & W. Railroad Company, under the St. of 1866, c. 278, took certain railroad property, "being all the property of the E. company," which had greatly increased in value; and a jury in 1867 assessed the damages for such taking at $536,260, and judgment was rendered for the E. company for $235,566, being the amount of the verdict after deducting certain incumbrances assumed by the B. & W. Railroad Company. In May, 1869, the E. company authorized the conveyance of all its corporate property to the B. & A. Railroad Company, the successor of the B. & W. Railroad Company, and such conveyance was duly executed. In 1865, the holder of certain unsecured bonds of the G. company, which were dated January 1, 1850, and became due on July 1, 1855, and were unpaid brought an action thereon which was still pending, when such holder, in 1869

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brought a bill in equity against the above corporations and A. and B., to reach and apply a sum of money in the possession of the B. & A. Railroad Company, and alleged to belong to the G. company, on account of fraud on the part of A. and B., in payment of his bonds. *Held*, that such holder had been guilty of laches and unreasonable delay, and that the bill could not be maintained.

BILL IN EQUITY, filed January 23, 1869, against the Grand Junction Railroad and Depot Company, the East Boston Freight Railroad Company, the Boston and Worcester Railroad Company, the Boston and Albany Railroad Company, Samuel S. Lewis and George W. Gordon, to reach and apply a sum of money in the possession of the two corporations last named, and alleged to belong to the first named corporation, in payment of a debt due from it to the plaintiff. Hearing on the pleadings and proofs, and an agreed statement of facts, before *Ames*, J., who reserved the case for the consideration of the full court. The material facts appear in the opinion.

G. G. Hubbard & C. E. Hubbard, for the plaintiff.

J. G. Abbott & B. Dean, for the defendants.

AMES, J. The Grand Junction Railroad and Depot Company became embarrassed, and ceased to pay the coupons on its bonds, in the latter part of the year 1856. Its property was incumbered by mortgages of a large amount, and it was understood to be hopelessly insolvent. The plaintiff held fifty of its bonds, dated January 1, 1850, unsecured by any mortgage, amounting to $25,000, (besides interest in arrear,) which had become due on July 1, 1855, and were not paid. Upon these bonds it commenced a suit in August, 1865, in which an attachment upon all of the debtor corporation's real estate was returned upon the writ, which suit was pending at the date of the filing of the plaintiff's bill. No part of the debt has ever been paid.

At a term of the Superior Court for the county of Suffolk, held in April, 1862, George W. Gordon, one of the defendants, then the treasurer of the corporation, obtained a judgment against it for about $26,000, upon which an execution was issued; and the execution so issued was levied upon and satisfied by the sale of its franchise, with all the rights and privileges thereof, "so far as relates to the receiving of toll," to the East Boston Freight Railroad Company, for the term of ninety-nine years. This last named corporation was chartered by the Legislature of this Com-

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monwealth in March, 1862, Gordon and Lewis being stockholders therein, and Gordon owning, at the first issue of the stock, nearly all the shares. In July, 1862, Lewis, professing to act on the behalf and with the authority of the Grand Junction Railroad and Depot Company, of which he was a director, executed a deed purporting to convey, in consideration of $13,085.56, all the real estate of that corporation, with its railroad and franchise, and all its rights and privileges, and the right of redeeming the same or any part thereof, to the East Boston Freight Railroad Company. At the annual meeting of the stockholders of the Grand Junction Railroad and Depot Company, held on May 31, 1862, a vote had been passed which in terms authorized Lewis to make this conveyance; and at a subsequent annual meeting, held on May 23, 1865, a vote was passed unanimously, to approve, ratify and confirm the above described conveyance, as the free act and deed of the corporation. In all these votes and acts of the corporation we find no apparent informality of any kind, and, so far as the title can be judged of by the papers alone, the franchise, property and rights of the Grand Junction Railroad and Depot Company were effectually transferred to the new corporation. This new corporation accordingly held the property and continued to exercise the franchise without interruption until November, 1866.

Under the authority given by the St. of 1866, *c.* 278, the Boston and Worcester Railroad Corporation, in November, 1866, took the railroad property known as the Union and Grand Junction Railroad, including all the railroad franchises and lands, "being all the property of the East Boston Freight Railroad Company," subject to the condition of paying to the owners such damages as should be awarded to them by the verdict of a jury upon proper proceedings. A hearing was accordingly had before a jury in December, 1867, and those damages were assessed at $536,260.20, and a verdict was rendered for that amount. At a term of the Superior Court in March, 1869, (viz.: June 8, 1869,) by agreement of the parties, judgment was rendered in favor of the East Boston Freight Railroad Company for the sum of $235,566.33, that being the amount of the verdict after deducting the amount of certain incumbrances assumed by the respondent in that case. And, in addition to

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this proceeding, the stockholders of the East Boston Freight Railroad Company, by vote passed May 19, 1869, authorized the conveyance of all the corporate property to the Boston and Albany Railroad Company, the successor of the Boston and Worcester Railroad Company, and such a conveyance has since been duly executed.

In its bill, the plaintiff insists that, however formal and regular the incorporation of the East Boston Freight Railroad Company, and its acquisition of the franchise and property of the Grand Junction Railroad and Depot Company, may appear on paper, the whole transaction was essentially fraudulent. The claim is that Gordon was not a *bonâ fide* creditor of the last named company; that the notes upon which his judgment was founded had been paid, or were originally without consideration and void; that the East Boston Freight Railroad Company was really Gordon and Lewis, under another name and form; and that the whole arrangement was merely a scheme to place the entire property in the hands of Gordon and Lewis and their associates, at an insignificant price, and to enable them to sell it at an enormous advance, leaving the plaintiff and perhaps other creditors wholly unprovided for.

The judgments in favor of Gordon were rendered in May, 1862. The new corporation was chartered about two months earlier; the franchise was sold on execution in June to that new corporation, and in July of the same year, in pursuance of a vote of the stockholders of the Grand Junction Railroad and Depot Company, the conveyance of the franchise and the property to the new corporation was executed and delivered. In other words, the fraud complained of was carried into effect about seven years before the plaintiff filed the present bill. It is not denied that the insolvency of the Grand Junction Railroad and Depot Company and the supposed worthlessness of its franchise and property were notorious, and as well known to the plaintiff as to the creditors generally. There is no evidence that, in the proceedings of Gordon and Lewis, and in the formation of the new company, there was any secrecy or concealment. They apparently were creditors seeking such security as they might be able to obtain from the wreck, and using such means for obtaining security as could be furnished by putting their de-

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mands in suit. There is no indication that the plaintiff made any movement whatever towards the recovery of its debt until August, 1865, when it brought an action at law, which action remained upon the docket of the court, undisposed of, till after this bill was brought. In the mean time, but after the franchise and property passed into the hands of the new company, the course of events had been such as greatly to increase the value of the purchase. We may infer from the report that the new company had put the track in good condition for use. The result of certain litigation had been that certain supposed incumbrances upon the property, to the amount of $200,000, had been judicially declared to have no binding force or validity. And as early as the year 1866, the possession of the property and franchise had become sufficiently important to the Boston and Worcester Railroad Company to induce that corporation to purchase the entire property, under the exercise of the right of eminent domain, at such price as a jury, upon regular proceedings, should see fit and just to assess. An opportunity was thus offered to the East Boston Freight Railroad Company to dispose of its entire property at a large advance.

In view of all these facts, and taking into consideration the inevitable publicity of most of the proceedings, the dates at which they occurred, and the ample means of knowledge, or at least the opportunities and inducements for inquiry, which the plaintiff had, we find it impossible to avoid the conclusion that there has been a great delay and neglect on its part to put its claim of right in force. It is a well settled rule in equity, that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. *Tash* v. *Adams*, 10 Cush. 252. *Fuller* v. *Melrose*, 1 Allen, 166. Equity regards diligence as one of its important elements, and it discountenances laches as inequitable. Unreasonable delay to prosecute an existing claim is a bar to a bill in equity, especially when the parties cannot be restored to their original position, and injustice may be done. *Peabody* v. *Flint*, 6 Allen, 52. The right of a party injured to rescind a fraudulent transaction remains only for a reasonable time after the discovery of the fraud. *Evans* v. *Bacon*, 99 Mass. 213. *Learned* v. *Foster*, 117 Mass. 365. In one case, after a delay of three

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years, and after the land which was the subject of a contract had greatly increased in value, this court refused to sustain a bill for specific performance of a contract to convey, on the ground that the party had not used reasonable diligence. *Boston & Maine Railroad* v. *Bartlett*, 10 Gray, 384. Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Each case is governed by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. *Brown* v. *Buena Vista County*, 95 U. S. 157, 160. When a party has been substantially aware of a transfer by a company of its property to another company, even though it has been transacted irregularly and informally, "it is utterly out of the question that he should be at liberty to come after the lapse of years and upset all that has been done." *In re Pinto Silver Mining Co.* 8 Ch. D. 273, 284.

We do not find, on examination of the facts reported, that anything was done which is charged to have been a fraud upon the plaintiff, after the time when the property of the Grand Junction Railroad and Depot Company was appropriated, as the bill charges, by Gordon and his associates to their own use, in 1862. We do not find that any new fact occurred after that time which could enlarge the plaintiff's rights, or give it any new right. The increased value of the property, produced by causes which came into operation after that time, certainly could have no such effect. We cannot avoid the conclusion that the plaintiff slumbered on its rights, and has only been roused into activity by the discovery that the value of the property had in various ways become unexpectedly large. It hardly need be said that this fact does not relieve its long delay of the imputation of the want of reasonable diligence in seeking its remedy. Upon this ground, therefore, we must order that the

Bill be dismissed.

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CHARLES O. WHITMORE & another *vs.* JOSHUA G. NICKERSON & others.

Suffolk. Nov. 13, 1877. — Oct. 21, 1878. COLT & AMES, JJ., absent.

A. indorsed in blank an unsigned promissory note in the form "we promise to pay to the order of A.," &c., and entrusted it to his clerk with instructions to deliver it to B. upon the latter's signing it with the name of his firm. The clerk delivered it to B. who signed it with his own name only. B. obtained and afterwards erased the signature of C. as an additional maker, and sold the note to D., who bought it in good faith; and it was found as a fact that D. was not guilty of negligence in failing to observe the erasure of C.'s name. *Held*, that D. could maintain an action on the note against A.

CONTRACT against Joshua G. Nickerson, Harrison Loring and F. H. Smith on the following promissory note: "Boston, April 10, 1875. $4500. Five months after date we promise to pay to the order of Harrison Loring forty-five hundred dollars. Payable at Faneuil Hall Bank. Value received. J. G. Nickerson." Indorsed "Harrison Loring, F. H. Smith."

At the trial in the Superior Court, before *Bacon*, J., without a jury, it appeared that on April 10, 1875, Nickerson applied to Loring for his indorsement of the note of the firm of J. G. Nickerson & Co., a firm consisting of Nickerson and T. B. Wales, Jr. Loring consented, wrote the note in suit, signed it as indorser, and left it with his bookkeeper, with instructions to deliver it to Nickerson upon his signing it with the firm name. Nickerson soon afterwards obtained it from the bookkeeper, signed it with his own name, saying he could get his partner to sign it with him, but preferred not to give a firm note. Loring was not informed of the manner in which the note was signed till shortly before it became due. Nickerson, having obtained the note, offered it at a bank for discount, but, observing that it read "we promise," did not leave it there, but took it to Smith, procured Smith's signature under his own name as a promisor, and then offered it again at the bank. The cashier of the bank pointed out to him that it was not drawn as a joint and several, but as a partnership note, and that Smith ought to have signed as indorser, and Nickerson thereupon took it back to Smith and requested him to erase his name from the face of the note, and sign it as second indorser. Smith's name was accordingly erased

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from the face of the note, and put on the back under Loring's. Nickerson then returned the note to the bank, which, however, did not discount it, but the cashier put it into the hands of a broker, who sold it to the plaintiffs at the usual discount, and paid the proceeds to the cashier, who paid them to Nickerson.

The plaintiffs bought the note in good faith, without any knowledge of the foregoing facts, and without observing that the note read "we promise," or that there was an erasure under the signature of the promisor. The plaintiffs bought the note relying solely on Loring's indorsement, and did not read it, but only looked to see that it was indorsed by Loring.

The defendant Loring asked the judge to rule as follows: "1. If Smith signed the note originally as joint promisor with Nickerson, and his name was erased by Nickerson, or at his request, after Loring had indorsed the note and delivered it to Nickerson, and without Loring's knowledge or consent, then Loring cannot be held, and it is immaterial whether Smith's original signature to the note was made before or after Loring's indorsement, or whether the plaintiffs knew or had reason to know that any change had been made in the note since Loring indorsed it. 2. If the note in suit, having been drawn in a form to call for the signature of more than one promisor, had upon its face the marks of an erasure under the signature of Nickerson at the time when it was presented to the plaintiffs for discount, these facts constituted *primâ facie* evidence that the note had been altered after Loring's indorsement, and the plaintiffs were bound to inquire into the actual facts, and are affected with notice of them."

The judge refused so to rule, but ruled that although Smith signed the note as joint promisor, and his name was afterwards erased and put on the back, yet, that having been done before it became a valid, binding note by its sale to the plaintiffs, Loring was not thereby relieved of his liability; and that, in the absence of negligence on the part of the plaintiffs, they were not affected by the want of authority in Nickerson, as between himself and Loring, to issue the note.

The judge found that Loring never authorized the note to be issued except with the signature of J. G. Nickerson & Co. as promisors, and that the plaintiffs were not negligent in failing

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to observe the form of the note or the erasure of Smith's name; and ordered judgment for the plaintiffs. The defendant Loring alleged exceptions.

W. G. Russell & G. Putnam, Jr., for Loring.

R. D. Smith, for the plaintiffs.

GRAY, C. J. Loring having indorsed the note in blank, and entrusted it to his clerk, with authority to deliver it to Nickerson upon his signing it with the name of his firm, was bound by the act of the clerk in delivering the note, in excess of his authority, to Nickerson before it had been signed by any one; and stood just as if he had himself delivered it to Nickerson with a blank for the signature of the maker. *Putnam* v. *Sullivan*, 4 Mass. 45, 54. *Fearing* v. *Clark*, 16 Gray, 74. *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, 199, 203.

The delivery of the note to Nickerson carried with it an implied authority to fill up this, like any other blank necessary to perfect the instrument, before issuing it; and the note issued by Nickerson, signed by himself as maker, to one who took it in good faith, bound Loring as indorser thereof. *Russel* v. *Langstaffe*, 2 Doug. 514. *Violett* v. *Patton*, 5 Cranch, 142. *Angle* v. *Northwestern Ins. Co.* 92 U. S. 330.

The fact that Nickerson, after receiving the note and before issuing it, had obtained and afterwards erased the signature of Smith as an additional maker, did not as matter of law avoid the note; because such erasure was no alteration of any contract that Loring ever made, for it neither altered the note as it was when Loring indorsed it, nor as it was when it first became available as a security.

The words in the body of the note, "we promise," did not make it less binding on a sole promisor. *Rice* v. *Gove*, 22 Pick. 158. *Holmes* v. *Sinclair*, 19 Ill. 71.

The form and appearance of the note were not material, except as bearing on the questions of fact of the knowledge and the negligence of the plaintiffs, both of which are concluded by the decision of the court below in their favor.

Exceptions overruled.

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GEORGE W. MESERVE *vs.* EBEN BACON.

Suffolk. March 5. — Oct. 21, 1878. COLT & SOULE, JJ., absent.

A corporation, to which A. had mortgaged a lot of land, sold it, under a power contained in the mortgage, to B., its treasurer, and conveyed the land to him by deed. B., in fact, held the title on a naked trust for the corporation. After this, the house on the land needing repairs, A., who did not know of the sale and supposed that he still held the equity of redemption, applied to the corporation to make an arrangement for the repairs, and was referred to B., and an agreement was made between A. and B. by which A. should make the repairs, and when so made the corporation should take a mortgage for a certain sum on the land, and, while the work was being done, the old mortgage should remain as it was. After the work was done by A., he discovered the fact of the sale under the mortgage. *Held*, that he could not maintain an action against B. for the cost of the work so done.

CONTRACT on an account annexed for money expended in labor and materials on certain houses.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff offered in evidence the report of an auditor, upon which the judge ruled that the action could not be maintained, ordered a verdict for the defendant, and allowed a bill of exceptions, the material parts of which appear in the opinion.

C. S. Lincoln, for the plaintiff.

S. Wells & F. L. Hayes, for the defendant.

LORD, J. The defendant in this case, by the finding of the auditor, held, upon a naked trust in favor of the John Hancock Mutual Life Insurance Company, certain real estate, upon which work was done by the plaintiff. He was the treasurer of the company and had the general management of its financial affairs. The plaintiff applied to the company to perform labor upon such real estate. At the time of such application, the plaintiff supposed that he himself was the owner of the equity of redemption of the real estate, and that the company was the mortgagee of the same. In fact, however, the mortgages held by the company had been foreclosed by a sale of the estate, and the deed had been made by the company to the defendant, who was nominally the purchaser, but who had no interest in the estate, and took the title upon a naked trust in favor of the company. When the plaintiff thus made application to the company, he in fact supposed that the labor which was to be done was to enure to his own benefit. There existed at the time two

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mortgages, one upon each of two several parcels of said estate, there being due upon each mortgage at the time of the foreclosure the sum of $3000. The work proposed was the raising of the house upon each parcel of the estate and putting in new foundations, which work was necessary to be done because of an order by the proper authorities of the city of Boston, for the reason that the houses in their then condition were unsafe, dangerous and a nuisance.

When the plaintiff thus applied to the John Hancock Mutual Life Insurance Company, his purpose was to raise the houses for his own benefit, but he desired the assistance of the company, supposing it to be the mortgagee, by means of an increased loan upon said houses respectively. He was referred to the defendant as the financial and business agent of the company, and through him an agreement was made with the company, that, upon the work being completed, the company would take a mortgage in the sum of $4000 upon each house, and that, till this was done, the mortgages should remain as they were. This agreement thus made by the defendant, in behalf of the company, was approved by its finance committee. The plaintiff performed the work, the company having, during its performance, advanced the sum of $1000. The plaintiff then bargained with one Murphy for the sale of one of the houses for the sum of $6000, of which $2000 was to be paid to him and the remaining $4000 was to be secured by mortgage to said company by the purchaser. The plaintiff made a deed to the purchaser, the grantee to make a mortgage to the company for $4000.

At this stage of the transaction, the plaintiff discovered the actual condition of the title; and the plaintiff and Murphy "saw the defendant at the office of the company and informed him of the sale to Murphy and that Murphy wanted his deed, and was ready to make and execute a mortgage of $4000 on the premises." "The defendant said that upon that house there was due to the company the sum of $4281.93, which would make $281.93 to be paid to the company. To this the plaintiff made some objection. The objection, however, was not insisted upon, and the defendant gave a deed of that house to Murphy; Murphy gave a mortgage thereof to the company for $4000, and out of the balance of the purchase money paid to the company said sum of $281.93, paying the remainder to the plaintiff."

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After this transaction was completed, "the plaintiff sold the other house to one Walsh, who agreed to pay $6000, by giving a mortgage of $4000 to the company and paying the balance to the plaintiff." Walsh and the plaintiff then applied to the defendant for a conveyance of that house to Walsh, he offering to give the said mortgage to the company. The defendant informed them that there was due to the company $4224.90, and that upon the payment to the company of $224.90, he would make the deed. The plaintiff objected to the payment of this sum of $224.90. The auditor finds that the plaintiff contended that the company had "charged him certain items which they had no right to charge;" and the auditor finds that in fact they "had charged him in the vicinity of $50, which was not properly charged." The auditor further finds that neither the plaintiff nor Walsh ever "offered to pay to the company said sum of $224.90, or any part of it." Walsh frequently applied to the defendant for a deed, but he never gave it; but did notify the plaintiff that he should sell it if the matter was not fixed up and the excess paid. "After waiting a time," the defendant sold and conveyed the same to one Meinrath. The plaintiff then presented to the defendant the claim now in suit as a claim against the company.

The auditor finds that the defendant "personally had no interest in the premises; that he bid off both houses at said mortgagee's sale for the said company and took the deeds and held them for the said company, and was ready and willing at all times to convey them as the company should direct."

Upon this state of facts, the only question which we are called upon to decide is, whether the plaintiff can maintain an action against the defendant upon an account annexed for the work and labor performed, and materials furnished and cash expended in the performance of such work. And we are clearly of opinion that he cannot. The defendant made no personal contract with the plaintiff; and the plaintiff understood that he made none. There was a mistake of fact in relation to the title on the part of the plaintiff. The defendant made no declaration in relation to the title. If it be assumed that the parties had not in law equal knowledge respecting the title, and if it be assumed further that it was the defendant's duty to disclose the facts

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in relation to it, he was bound to disclose only the exact truth. That exact truth was that the legal title was in himself, but that the entire beneficial estate was in the John Hancock Mutual Life Insurance Company, and his own estate was a naked trust. We are not aware of any case in which the law implies a promise on the part of a defendant for labor done by the plaintiff, except when the defendant has received a benefit from the labor.

We do not deem it necessary to decide whether the plaintiff might have claimed a lien upon the estate for the labor, &c., though it is difficult to perceive a good reason why he might not, when the labor is performed for the benefit of the party who had all the beneficial interest in the estate, the agent of such party holding the legal title; and this suggestion is made merely in consequence of the argument of the plaintiff's counsel that the defendant by his act prevented the plaintiff from acquiring a lien. If it were so, it would simply be proof that a fraud of the defendant operated to the injury of the plaintiff, the remedy for which would be in tort and not in contract.

There are, however, other intrinsic difficulties in the case. The work was not done under a contract to pay for it in money. The plaintiff performed the labor under a contract with the insurance company, and his compensation was to be the enhanced value of the real estate. If the party with whom he made the contract did not do what he agreed to do, either because it was not in his power to do it, or refused to do it because he had a right to avail himself of the fact that the contract was not in writing and therefore not binding upon him, he would, under the familiar decisions of this court, be liable to pay for the services, &c., in money. It is true that, as a condition of performance, the company demanded something "in the vicinity of fifty dollars," which it had not the right to claim according to the finding of the auditor. It is, however, to be remembered that the insurance company has not been heard upon that question; and when heard, it may appear that the company has ever been willing and ready to perform all it agreed to perform.

Exceptions overruled.

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WESLEY C. COOK *vs.* DANIEL A. BROWN & another.

Suffolk. March 15. — October 21, 1878. COLT & SOULE, JJ., absent.

A person may maintain an action against two or more persons, who, by concert of action, fraudulently induce him to leave his home in another state and come into this Commonwealth, with intent to cause his arrest and compel him to settle a disputed claim; and it is no bar to the action that, after his arrest, he submitted himself to the jurisdiction of the court without pleading the illegality of his arrest in abatement.

TORT. The declaration alleged that the defendants, contriving to extort a pecuniary advantage from the plaintiff, and to compel him to do an act against his will, fraudulently induced him to come from the State of Rhode Island, where he lived, into this Commonwealth, within the jurisdiction of the Superior Court, so as to render himself amenable to its process, intending to arrest and imprison him when he did so come, and thereby compel him to settle a disputed claim; that, in pursuance of such fraudulent purpose, in anticipation of his coming, and when they knew he had not yet come, they procured a writ to be made, alleging that he was then commorant of Boston, and on that writ procured a false affidavit to be made that he was then about to leave the state, and a certificate of a magistrate to be made thereon, authorizing the plaintiff's arrest; and that, when he did come, they caused him to be arrested on that writ and to be detained a long time. Answer, a general denial.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff introduced evidence tending to prove the facts alleged in the declaration; but it being conceded that, after his arrest, the plaintiff gave bail and answered to the defendants' action, and that said action was tried, and the defendants recovered a part of their claim against the plaintiff, and judgment was entered thereon, the judge ruled, as matter of law, that the plaintiff, by appearing and submitting to the jurisdiction of the court in that action, without pleading the illegality of the service of process upon him in abatement, was concluded by the judgment in that action, and could not maintain this action; and directed a verdict for the defendants. The plaintiff alleged exceptions.

S. J. Thomas, for the plaintiff, in addition to the cases cited in the opinion, cited *Daw* v. *Swaine*, 1 Sid. 424; *Gilding* v. *Eyre*, 10 C. B. (N. S.) 592.

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R. M. Morse, Jr., for the defendants. The action cannot be maintained as an action for false imprisonment; nor for malicious prosecution. *Reynolds* v. *Corp*, 3 Caines, 267. *Blanchard* v. *Goss*, 2 N. H. 491. *Cloon* v. *Gerry*, 13 Gray, 201. The only method, if any, by which the plaintiff could enforce a claim for damages, for an arrest procured by the acts of fraud alleged against the defendants, in enticing him into the state, was by causing the writ on which he was arrested to be abated, and then bringing an action for false imprisonment, on the ground that, the process on which he was arrested having been adjudged a nullity, the arrest was unauthorized. *Hayden* v. *Shed*, 11 Mass. 500. *Parsons* v. *Loyd*, 3 Wils. 341. *Reynolds* v. *Corp*, 3 Caines, 271. *Searll* v. *McCracken*, 16 How. Pr. 262. *Blanchard* v. *Goss*, *ubi supra*.

The plaintiff might have pleaded the facts set out in his declaration in abatement of the suit of Brown against him. *Brigham* v. *Clark*, 20 Pick. 43. *Simonds* v. *Parker*, 1 Met. 508. *Steele* v. *Bates*, 2 Aik. 338. *Goupil* v. *Simonson*, 3 Abb. Pr. 474. He elected to waive the illegality of the arrest, submitted voluntarily to the jurisdiction of the court, defended the case on its merits, and submitted to judgment against him in the same. He is now estopped by that judgment, not only as to the merits of the case, but also as to all the facts which constituted the necessary steps on which that judgment was founded. *Henderson* v. *Henderson*, 3 Hare, 100, 115. *The Queen* v. *Hartington*, 4 El. & Bl. 780. *The Queen* v. *Wye*, 7 A. & E. 761. *Eastman* v. *Cooper*, 15 Pick. 276. *Burlen* v. *Shannon*, 99 Mass. 200. *Dunlap* v. *Glidden*, 31 Maine, 435. *Chamberlain* v. *Gaillard*, 26 Ala. 504. *Roberts* v. *Heim*, 27 Ala. 678.

LORD, J. It may be that, in this case, the plaintiff's cause of action is defectively set out in his declaration; but no such objection is made to the declaration, nor is the sufficiency of the declaration in matter of form before us. The trial seems to have proceeded, and the rulings of the presiding judge made, upon the theory that matters which are alleged merely as aggravation of the injury were themselves the cause of action. The action is not an action for malicious prosecution, nor is it an action for false imprisonment, nor in any manner an action for abuse of legal process. The real cause of action, as appears from the

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plaintiff's declaration, is, that the defendants, by concert of action, fraudulently, and by means of false pretences, induced the plaintiff to leave his home in another state, and to come into this state. What the defendants did after his arrival within this Commonwealth is claimed to be an aggravation of the original wrong, for which the plaintiff is entitled to compensation. Whether it is properly to be so considered is a question not now before us. The real and exact question which we are called upon to decide is this: Has a party a right of action against two or more parties, who, by concert of action, fraudulently and by false pretences, induce such party to leave his business and his home, and travel into another state?

We think that, in principle, he has. There is involved a loss of time, a neglect of business, and an expenditure of money, which are capable of being proved, and which are a direct and immediate injury to the party; and when such loss can be traced as the direct consequence of the fraudulent acts and false pretences of others, acting in concert to produce it, we can see no reason why, in principle, those who have caused the injury should not be responsible in law to the party suffering it. And, so far as we have been able to discover authorities upon the point, they concur with this view. It is true that commonly a party has caused himself to be released by judicial proceeding from the arrest made under circumstances similar to those in the case at bar, but, after such release, it has been held that damages might also be recovered of the party by whose fraud he was brought into the position in which the arrest could be made. It is obvious, however, that in such case the cause of action is not the arrest of the party, but is what the defendants had done prior to the arrest. Had they been guilty of no wrong before the arrest, the arrest would have been lawful, and would have afforded no cause of action. If the gist of the action was a malicious prosecution, or a fraudulent arrest, there would be great force in the argument of the defendants' counsel; but as the cause of action is entirely different from and independent of a malicious prosecution or fraudulent arrest, the decisions, which are made in actions of that nature, are comparatively unimportant. It is not necessary to decide whether the declaration, if objected to for that cause, would be sufficient as a charge of con-

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spiracy against the plaintiff, to do him an injury, which resulted in accomplishing the injury designed; nor is it necessary to decide that the declaration, if objected to on that account, would be defective in not stating more fully and distinctly the means by which the fraud was consummated. No such question was presented to or passed upon by the presiding judge at the trial; but his ruling assumes that, whatever was the nature of the conspiracy or of the fraud by which the plaintiff was brought within the jurisdiction of the court, he can have no action for that fraud if he submits himself to the jurisdiction of the court, and does not avail himself of legal means to be discharged from arrest and to stop the proceedings against him. It is to this principle that we cannot accede.

We find nothing in the authorities cited by the defendants in conflict with these views. Some of the cases cited by the plaintiff's counsel are quite similar to the case at bar in their facts, and it has been held that the action could be maintained; and, in several of them, the principles upon which this action is maintained have been fully commented on and sustained. See *Wanzer* v. *Bright*, 52 Ill. 35; *Phelps* v. *Goddard*, 1 Tyler, 60; *Grainger* v. *Hill*, 4 Bing. N. C. 212; *Heywood* v. *Collinge*, 9 A. & E. 268. *Exceptions sustained.*

NORTH NATIONAL BANK *vs.* HENRY H. HAMLIN.

Suffolk. March 19. — Oct. 21, 1878. AMES & MORTON, JJ., absent.

In an action by a bank against A., the maker of a promissory note indorsed by B., in which the answer was a general denial, it appeared that two days after the maturity of the note, which had been protested for non-payment and the indorser duly notified, the plaintiff charged off a certain balance which stood upon its books to the credit of B., who kept an account there, and shortly after sent him a notice stating this amount to be charged him "for payment of A.'s note;" that in the mean time B. had failed; that, at the time when the balance was charged off, and B. notified of it, the note in suit was the only claim due against B. in the hands of the plaintiff, which, however, held other notes not then due, upon which B. was indorser, to none of which A. was a party; that the plaintiff's officers testified that they did not intend to apply the balance charged off to the note in suit exclusively, but they held it to be applied to any claim against B. to which they had a right to apply it; that at the commencement of bankruptcy proceedings by B., the plaintiff rendered him an account, in which all claims which it then had

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against him were charged, and all payments received on his account credited; that the first item on the debit side of the account was the note in suit, charged at its full amount, and in the same line, upon the credit side, was the balance which had been charged off; that the dividends in bankruptcy were paid upon the balance due the plaintiff upon this general account. The defendant asked the judge to rule that the plaintiff was bound to apply the balance charged off to the note in suit; and that the defendant was entitled to have it deducted from the amount of the judgment in this action. The judge refused so to rule; found that the plaintiff did not in fact so apply it; and ordered judgment for the plaintiff for a sum which included the balance charged off. *Held*, that the defendant had no ground of exception.

CONTRACT upon a promissory note for $1,815.09, made by the defendant payable to his own order, indorsed by Robert W. Dresser & Co., to whom it was delivered by the defendant, and for whom it was discounted by the plaintiff. Answer. A general denial.

At the trial in the Superior Court, before *Wilkinson*, J., the evidence tended to show that on November 24, 1875, two days after the maturity of the note, which had been protested for non-payment at Norwich, Conn., and the indorsers duly notified, the plaintiff charged off a balance of $686, which stood upon its books to the credit of Dresser & Co., who kept an account there, and, about the first of the following month, sent them, with their pass-book and the checks of the month, the paper of which a copy is printed in the margin.* This paper was written by the plaintiff's cashier, who testified that the letters "ch" near the bottom thereof meant "charged." Dresser had died and his firm had failed in the mean time; at the time when the balance was charged off, and the paper sent Dresser & Co., the note in suit was the only claim due against them in the hands of the plaintiff, which, however, held other notes not then due, upon which Dresser & Co. were indorsers, to none of which, so far as it appeared, the defendant was a party. The plaintiff's president and cashier testified that they did not intend, at the time of the transaction above stated, to apply the $686 to the note in suit

* "$686. Boston, Nov. 24, 1875.

North National Bank.

For payment Hamlin & Co.'s note protested at Norwich six hundred eighty-six dollars.

ch. R. W. Dresser & Co.
per J. B. W., Cashier."

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exclusively, but that they held it to be applied to any claim or claims against Dresser & Co., to which they had a right to apply it; that the sum in question was taken from the general funds of the bank when it was charged off, and deposited by the cashier in a trunk, where it remained until a final dividend in bankruptcy was paid by the surviving partner of Dresser & Co., when it was taken from the trunk and replaced in the general funds; and that the plaintiff rendered the surviving partner an account, at the commencement of the bankruptcy proceedings, in which all claims which it then had against Dresser & Co., absolute or contingent, were charged, and all payments received on their account credited. It further appeared that the first item on the debit side of the account was the note in suit, charged at its full amount, and in the same line, upon the credit side, the $686 was credited; that the dividends in bankruptcy were paid upon the balance due the plaintiff upon this general account; and that nothing was ever done with the $686, and no specific appropriation of it made, except as above stated.

The defendant asked the judge to rule that, upon these facts, the plaintiff was bound to apply the $686 to the note in suit; and that the defendant was entitled to have it deducted from the amount of the judgment in this action. The judge refused so to rule; found that the plaintiff did not, in fact, so apply it; and ordered judgment for the plaintiff for a sum which included the $686. The defendant alleged exceptions.

A. E. Pillsbury, for the defendant.

A. E. Jones, for the plaintiff.

LORD, J. In the absence of evidence, the defendant, as maker of the note in suit, is to be deemed as ultimately liable to pay it, between the parties to it. The defendant claims a deduction from the amount of the note because of a partial payment. Such payment is not pleaded; if made, it was not made by him; nor in his behalf; nor was it a payment, which, in law, would enure to his benefit; and the presiding judge has found as a fact that it was not made. This finding was upon competent and sufficient testimony. *Exceptions overruled.*

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HENRY HILL *vs.* JOHN DOWNES & others.

Suffolk. March 26. — Oct. 21, 1878. AMES & MORTON, JJ., absent.

A testator, by his will, devised his estate to his wife for life or during widowhood, and, if she married again, or at her death, to his "heirs at law;" bequeathed small legacies to his children, who were his heirs at law, "in addition to their equal shares of my real and personal estate to which they may be entitled" after the termination of their mother's interest; and gave the residue of his estate, after such termination, to his children, "to be divided in equal shares between them, to have and to hold the same to them, my said children, their heirs and assigns forever; and my said wife shall never, by the law of descent, become the heir to any or either of my children; and if it should so happen that any child of mine, holding property, should decease during the lifetime of its mother, the property thus left by such deceased child shall become, belong to and be received by the other surviving children or child." *Held*, that the clause as to the inheritance of the testator's wife from his children and as to the property of any child, dying during its mother's lifetime, going to the survivor or survivors, was inoperative and void; that the testator's children took vested remainders subject to his wife's life estate, the children of a deceased child taking by right of representation; and that the testator's wife inherited her proportionate share of the estate of a child who died intestate and without issue during her widowhood.

BILL IN EQUITY, filed May 18, 1877, by the executor of the will of John Downes, who died on August 11, 1854, to obtain the instructions of the court.

The will, which was dated July 29, 1852, and admitted to probate on August 15, 1854, contained, among other provisions not material to be stated, the following:

"First. I give and bequeath to my beloved wife, Maria Gertrude Downes, the use and improvement of all my real and personal estate, (excepting such as is otherwise disposed of in and by this will,) to have and to hold the said use and improvement during her natural life, or so long as she may remain my widow; but in the event of her again marrying, or at the time of her decease, all the said real and personal estate of which she held the use and improvement is hereby given, bequeathed to my heirs at law."

[Here followed small specific legacies to three of the testator's four children, his heirs at law, John Downes, Jr., Charles A. Downes, Henry H. Downes, and a legacy of $100 to the other, Julia M. Missroon.]

"All the foregoing legacies and bequests to my children are in addition to their equal shares of my real and personal estate

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to which they may be entitled after the determination of the use and improvement thereof as hereinbefore provided for their mother.

"And as to the residue of all my estate, whether real, personal or mixed, of which I may die seised and possessed, after the payment of all just debts, and the foregoing legacies and annuity, and after discharging all the claims which my widow may have and hold under this will, I hereby give, bequeath and devise the said residue to my four children above named, to be divided in equal shares between them, to have and to hold the same to them, my said children, their heirs and assigns forever; and my said wife shall never, by the law of descent, become the heir to any or either of my children; and if it should so happen that any child of mine, holding property, should decease during the lifetime of its mother, the property thus left by such deceased child shall become, belong to and be received by the other surviving children or child."

The bill alleged that Henry H. Downes died on September 26, 1864, unmarried, intestate and without issue; that John Downes, Jr., died on September 21, 1865, leaving a widow and six children and a will, by which he gave the income of all his property to his widow while she remained unmarried, such property at her death to be divided equally among his children; that Charles A. Downes died on January 24, 1875, unmarried, intestate and without issue; and that Maria G. Downes, the testator's wife, died on February 22, 1877.

The executor requested the following instructions:

"1. Whether or not Julia Maria Missroon, as only surviving child of said John Downes, is entitled, under said will, to all the rest and residue of the estate of said John Downes.

"2. Whether or not the widow and children of John Downes, the younger, are entitled, under said will, to a share of the rest and residue of said estate; and if they are, what share, respectively, and to whom he should convey the same.

"3. Whether, upon the decease of Henry H. Downes, his interest in said estate became vested in his heirs at law; to wit, in his brother Charles A. Downes, his sister, Mrs. Missroon, his brother John Downes, and his mother; and whether, if his interest would have so vested, his mother was prevented from tak-

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ing the share she would have otherwise taken, by the terms of said will.

"4. Whether, upon the decease of Charles A. Downes, the interest in the estate, if any, which he took as one of the heirs at law of Henry H. Downes, is to be considered as part of the estate to go to the surviving children of the testator, or to the heirs at law of said Charles A. Downes."

The defendants filed answers admitting the allegations of the bill to be true; and the case was heard, on the bill and answers, by *Endicott*, J., who made a decree, which, so far as need now be stated, was as follows:

"This cause came on to be heard, and was argued by counsel, and, upon consideration thereof, it is adjudged and decreed, that by the will of the testator John Downes, his four children living at his death, to wit, John Downes, Junior, Charles A. Downes, Henry H. Downes and Julia M. Missroon, took vested remainders in the rest and residue of his estate, subject to the life estate therein of his widow, Maria G. Downes; that upon the death of Henry H. Downes, unmarried and without issue, and intestate, his share of the rest and residue of said estate descended in equal shares to his mother, Maria G. Downes, and his brothers, John Downes, Junior, and Charles A. Downes, and his sister, Julia M. Missroon, subject to administration thereon according to law; that the legatees and devisees of John Downes, Junior, are entitled under his will to the share of said rest and residue vested in him at his death, subject to administration thereon according to law; that upon the death of Charles A. Downes, his share of said rest and residue descended in equal shares to his mother, Maria G. Downes, his sister, Julia M. Missroon, and the children of John Downes, Junior, the said children taking by representation, subject to administration thereon according to law." The defendants appealed from this decree.

H. C. Hutchins, for Julia M. Missroon and the executor of Maria G. Downes.

E. D. Sohier, for the widow of John Downes, Jr.

J. D. Bryant, for the children of John Downes, Jr.

LORD, J. The decree of the presiding justice in this case must be affirmed. It is undoubtedly true that the testator intended that his widow should take nothing of his estate, as heir

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at law to either of his children, if any of them should die during her lifetime. This provision it was competent for him to make, if he used apt and sufficient words for that purpose. A testator may, by the use of appropriate language, prevent the operation of the statute of wills, or the statute of distributions upon property which he leaves, during the time in which he has power over the same. A testator cannot, however, give an absolute estate in fee simple to one, and then, making no other disposition of it, declare that it shall not descend in the manner provided by law.

We have said that it was, in this case, the intention of the testator that his widow should not take by inheritance any portion given to a child who should die during her lifetime. This intent, as literally expressed, cannot be effected. We should, however, hold that such intent, if clearly discoverable from the will, though imperfectly and defectively expressed, should be carried out, if this could be done consistently with established rules of law, with the true principles of construction and with the general intent of the will. We find it difficult to do so without contravening each one of these elements.

While it is true that such intent existed, it is also entirely plain that it was not the only nor the leading intent of the testator; but was subordinate to the well-expressed intention that the children should take an absolute vested interest in all of what he should die possessed, subject only to the life estate of his widow. This general and controlling purpose is not only stated in apt and even technical language, but is thus stated repeatedly. The first clause of the will clearly manifests this; for, after giving all his estate, with unimportant exceptions, to his widow, during her widowhood, he adds, "but in the event of her again marrying, or at the time of her decease, all the said real and personal estate of which she held the use and improvement is hereby given, bequeathed to my heirs at law." His heirs at law were his four children, John Downes, Jr., Charles Albert Downes, Henry Hill Downes and Julia Maria Missroon. To each one of these four children he had given a specific legacy, of comparatively slight intrinsic value, except to Mrs. Missroon, to whom he gave one hundred dollars. After these four legacies, he adds: "All the foregoing legacies and bequests tc

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my children are in addition to their equal shares of my real and personal estate," after the termination of the provision for their mother. In the residuary clause of the will, after the mother's estate is terminated, he says: "I hereby give, bequeath and devise the said residue to my four children above named, to be divided in equal shares between them, to have and to hold the same to them my said children, their heirs and assigns forever." It cannot be doubted that this language is technically accurate for the purpose of giving to each of the children a vested remainder. Then follows the language from which the apparent difficulty arises, "and my said wife shall never, by the law of descent, become the heir to any or either of my children." If it stopped there, it would have been clearly inoperative and void, as an attempt to alter the statute of distributions of the Commonwealth. But the clause proceeds, "and if it should happen that any child of mine, holding property, should decease during the lifetime of its mother, the property thus left by such deceased child shall become, belong to and be received by the other surviving children or child." This language is, in several respects, peculiarly infelicitous. In the first place, it literally refers to all such as the child should be possessed of in any mode; and is not only an alteration of the statute of distributions, but is a repeal of the statute of wills, taking away from persons of full age the power to dispose of their property by will. Of course, it could not be contended that such was the intent of the testator; but that the intent must be limited to the remainder of the estate given by the will. The expression, "holding property," would then create embarrassment. It is not easy to appreciate the precise idea which the scrivener had in his mind, when using the words "holding property," if the legatee was to have no property except upon condition of surviving the tenant for life, or her who was entitled to the income during life.

Whatever other purpose the testator had in his mind, this seems as clearly evident as if it were expressed in words, that it was the intention of the testator that the issue of a deceased child should take to the exclusion of other children of the testator. It is true that this intent is not found in the language we are commenting upon; but the previous language of the residuary clause, as well as the first clause of the will and the

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purpose to give equal shares to the several children, are conclusive that the issue of a deceased child was to take the parent's share.

There is another difficulty in attempting to give construction to the language used. The provision for the widow is limited to her widowhood. The clause in the will we are commenting on relates to the death of a child during the lifetime of the mother, though her widowhood might have ceased years before, and the property have been for years in the possession of the child. It is suggested by counsel, that we may, for the purpose of carrying out the intention of the testator, insert the words "intestate and without issue," so that the will would read, "if it should so happen that any child of mine, holding property, should decease intestate and without issue," &c.; and, although not suggested by counsel, it would be necessary also to substitute "during the widowhood" for the phrase "during the lifetime." It is undoubtedly true that words may be supplied, when the intention of the testator is entirely clear, and the supplied words do not contravene any intent of the testator. Words cannot be supplied to create an intent; and if the intent is not manifest, the supplying of words is making a will for the testator, and not giving effect to his will. In this case, the words used by the testator do not express an intent which it was competent to the testator to have. We could insert words which would express an intent competent to him; and then we could insert other words which would make that intent consistent with the remainder of the will; but when we had done so, the inquiry would arise whether it was the will of the testator, or one made for him. Upon what principle should we insert the word "intestate," or determine whether to insert the word "unmarried," or the word "married?" We have no evidence from the will itself that the testator did not intend to prevent any portion of the residue from being diverted from the other children by will, as well as by inheritance by the mother. What words it is necessary to add, in order to carry out the intention of the testator, must be, at best, but conjectural; and, inasmuch as the literal meaning of the language used cannot be attached to it, and a liberal construction of the language, in order to meet the testator's views, will obviously contravene the prime intent of the

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testator, and as it is uncertain what words should be used to effectuate his purpose, the language used can only be considered inoperative and void; and in that case the true meaning of the will is expressed in the decree of the presiding judge.

Decree affirmed, with costs to the plaintiff on the appeal.

ATTORNEY GENERAL *vs.* METROPOLITAN RAILROAD COMPANY.

Suffolk. March 27. — Oct. 21, 1878. AMES & MORTON, JJ., absent.

A license by municipal authority, under a statute, to a street railroad corporation to reasonably use a highway, is not the appropriation of an additional easement in the highway, which will, without special provision therefor, entitle abutters to compensation; and is constitutional.

It is no ground for an information in equity by the attorney general to restrain a street railroad corporation from laying its tracks and running its cars in a certain street, under the authority of an order of the board of aldermen of the city of Boston, that the corporation had failed to accept the order by a writing filed with the city clerk within thirty days from the passage of the order, as required by its terms, the information having been filed before the end of such thirty days; and that the tracks as laid did not comply with the order, the variation not being stated, and not appearing to be material or intentional.

COLT, J. This is an information in equity filed by the attorney general, at the relation of Eben Jordan and others, occupiers of land abutting on Washington Street in the city of Boston. As it was first filed, it alleged that the defendant corporation, under the authority of an order of the board of aldermen of the city of Boston, was about to lay down two parallel street railway tracks in Washington Street, between Temple Place and Summer Street, and to run its cars thereon; that it was impossible to lay down these tracks, so as to leave sufficient space for ordinary vehicles to pass between either curbstone and a car upon the nearest track thereto; and that the construction of these tracks and the running of cars thereon would create a public nuisance. It alleged that this order was of no validity, and that the board of aldermen had no power to authorize the creation or continuance of a common nuisance. It asked that the order be declared void, and the corporation restrained from proceeding under it.

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A supplemental information alleges that there was no acceptance in writing by the corporation of the order of location, under which the tracks were constructed, within thirty days, as required by its terms, whereby the order became void. It also further alleges that the corporation failed to conform to the order by laying its tracks nearer the easterly curbstone than was therein allowed. There were general demurrers to both informations, and the case comes up on appeal from the decree of the single judge sustaining the demurrers and dismissing the informations.

The jurisdiction of a court of equity to abate an existing, or prevent a threatened nuisance, upon information filed by the attorney general, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition. *Attorney General* v. *Tudor Ice Co.* 104 Mass. 239. The nuisance must be clearly established. *District Attorney* v. *Lynn & Boston Railroad*, 16 Gray, 242. And the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. *Attorney General* v. *Bay State Brick Co.* 115 Mass. 431, 438. There must be a want of adequate, sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong. *Attorney General* v. *Sheffield Gas Co.* 3 De G., M. & G. 304. *Bigelow* v. *Hartford Bridge*, 14 Conn. 565. *Spencer* v. *London & Birmingham Railway*, 8 Sim. 193. *Davis* v. *Mayor, &c. of New York*, 4 Kernan, 506.

The right to locate or to change the location or position of the tracks of a street railway corporation is given by law to the board of aldermen of the city in which such corporation is authorized to construct its road. St. 1871, *c.* 381, §§ 14, 15. The same board is empowered to make regulations for operating the road and keeping the streets occupied by its location in repair. §§ 18, 19. The corporation is made liable over to the city for any defect or want of repair in that part of any street occupied by its tracks; § 22; and is forbidden to obstruct public travel, wilfully or negligently. § 30. The board of aldermen of the city of Boston are also surveyors of highways, and thus the full control of the streets, with the power to locate tracks and to regulate the running of the cars, is left to them.

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The information alleges that the board of aldermen "undertook to pass and did pass, so far as they had the power to pass," the order complained of. There is no allegation of informality or want of validity in the passage of the order. The complaint, as set forth, is that the use of these tracks will produce unusual obstruction to public travel, and therefore cannot be legally authorized by the board of aldermen, under the laws of this Commonwealth.

The power of the Legislature to authorize the construction of a street railway, without the consent of the adjoining proprietors, and without compensation in damages to the owners of the soil over which the highway is located, has long been exercised in this Commonwealth. It was early recognized in the case of *Commonwealth* v. *Temple*, 14 Gray, 69, where it was declared by Chief Justice Shaw that "all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the Legislature, exercising the sovereign power of the state." The future alteration and use of public streets for public travel must always be subject to reasonable modification by future legislation. The compensation of landowners and adjoining proprietors must be presumed to have been adjusted to such future changes. Their convenience may be affected thereby without impairing any constitutional right to additional compensation. *Cushing* v. *Boston*, 122 Mass. 173. The Legislature may indeed provide compensation, but, without provision, there is no legal claim to it. Thus the right to alter or change the grade; *Callender* v. *Marsh*, 1 Pick. 418; Gen. Sts. *c.* 44, § 19; to provide for the construction of sidewalks for the exclusive use of foot passengers; Gen. Sts. *c.* 45, § 6; to regulate public travel by the law of the road; Gen. Sts. *c.* 77; to prescribe what kind of repairs shall be made, and what kind of vehicles shall be used, are clearly within its power.

The franchise granted to a street railway corporation is not the grant of a right to appropriate without compensation an additional easement in the soil of the street. Nor can such use of the streets, under proper restrictions, be considered as the imposition of an additional servitude upon the land of the owner. The peculiar privilege given is the right, not to acquire land, or

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an easement in land, but only the right, so long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel, for the purpose of facilitating such travel; to modify the public use, and change, to some extent, the law of the road. Such a privilege, however wide the street in which it is exercised, must always create some obstruction to other travel, and be to some extent exclusive; and this is true of all other kinds of public travel. The location of a highway creates a servitude which includes all forms of travel not prohibited by law, with the right in the Legislature to give to municipal or other corporations, or to private individuals, the power reasonably to modify the use of the same for travel, as public convenience and necessity, in the application of modern improvements, may from time to time require.

Upon the facts presented by this information, it is not necessary to decide whether, under this power, street-railway tracks may be so located as practically to destroy the public highways for use as such. It is not contended that other modes of travel are practically excluded. The degree to which such travel is incommoded is for the consideration of the municipal authorities. It is sufficient that we see no constitutional objection to the law under which the defendant was licensed to do the acts complained of. *Elliott* v. *Fair Haven & Westville Railroad*, 32 Conn. 579. *Hinchman* v. *Patterson Horse Railroad*, 2 C. E. Green, 75.

The right to lay down tracks, under the order of location, was upon the condition that the defendant corporation should accept the same, and agree in writing to comply with the conditions thereof, and file the same with the city clerk within thirty days of the date of the passage of the order. St. 1871, *c.* 381, §§ 14, 15. The allegation in the supplemental information is that the corporation did not comply with the conditions; but it was admitted by the counsel for the attorney general, that, at the time of the passage of the order, the president of the defendant corporation filed an acceptance of the location with the city clerk; and that on the next day, after part of the track was down, the directors voted to confirm the act of the president, and to agree to comply with the conditions of the order; and this vote was on the next day duly filed with the city clerk. The street-railway

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laws do not require that the acceptance shall be filed before the laying of the track. It does not appear that the cars were run upon this track before these papers were filed. It is the running of the cars, and not the laying of the track, that creates the nuisance. Both informations in this case were filed before the expiration of the thirty days. The informality, if any exists here, may have been waived or otherwise cured, and cannot be taken advantage of in this proceeding, upon the facts here stated.

It is further alleged that the corporation has not complied with the order in laying down these tracks, but has laid them down nearer the curbstone and the easterly line of the street than was permitted. The extent of this variation is not stated; it does not appear to have materially or substantially differed from the lines as indicated upon the plan referred to in the order. There is no charge that the variance in any way increases the inconvenience to public travel, or that there was any intentional departure from the terms of the order. The injury, if any, is plainly not of such a character as to justify the interference of a court of equity, upon an information filed by the attorney general. *Decree affirmed, with costs.*

H. Jewell & W. Gaston, (*J. P. Healy* with them,) for the defendant.

J. D. Ball, for the Attorney General.

JOHN S. W. LANE *vs.* CITY OF BOSTON.

Suffolk. March 11. — Oct. 29, 1878. COLT & SOULE, JJ., absent.

An order of selectmen, accepted by the town, widened a street, referred to a certain plan as showing the "several locations and the amounts of land taken," and awarded damages therefor to the owners. The grade of the street was subsequently changed by another order, as shown upon a certain other "plan and profile." *Held*, that the change of grade was a new and independent proceeding, for which a landowner was entitled to additional damages.

PETITION to the Superior Court for a jury to assess damages occasioned to the land of the petitioner by the raising the grade of Foster Street in that part of Boston formerly Brighton.

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Trial in the Superior Court, before *Wilkinson*, J., who, after a verdict for the plaintiff, allowed a bill of exceptions, the substance of which appears in the opinion.

C. F. Kittredge, for the respondent.

G. E. Smith, for the petitioner.

AMES, J. Upon a petition that Foster Street, in the town of Brighton, should be altered and widened, the selectmen in September, 1873, adjudged that common convenience and necessity required that the way should be altered "by widening." They thereupon proceeded to lay out certain alterations "for the purpose of widening said street," and awarded damages to the several owners of lands taken for the purpose; and the location, widening and alteration, were duly accepted by the town. The reference in the order to a plan filed in the town clerk's office is only to show the "several locations and the amounts of land taken from each of the owners." It does not appear that any change whatever was made or contemplated in these proceedings, in the grade of the street, or that the damages awarded included any compensation to such owners other than for the value of the land actually taken.

After the annexation of Brighton to the city of Boston, in June, 1874, the board of aldermen of Boston proceeded to establish the grade of the same street, "as shown upon a plan and profile drawn by the city surveyor, dated May 1, 1874." In pursuance of the vote of the board, the street was finished upon the proposed grade in September, 1874, and the petitioner presented his claim for damages in the course of that month. It appears to us that this action on the part of the city was a new and independent proceeding, and that the damages claimed in the present petition do not include compensation for changes in the surface of the street injurious to the landowner, necessary to and contemplated in the original widening, or new location or alteration. The case falls exactly within the rule laid down in *Snow* v. *Provincetown*, 109 Mass. 123, and is entirely consistent with the decisions in *Ryan* v. *Boston*, 118 Mass. 248, and *Geraghty* v. *Boston*, 120 Mass. 416, which are relied upon by the respondent. *Exceptions overruled.*

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CHARLES ENDICOTT *vs.* INHABITANTS OF HOPKINTON.

Middlesex. Jan. 9. — Oct. 17, 1878. AMES & LORD, JJ., absent.

In action for the support of a pauper, it appeared that the husband of the pauper resided on a freehold estate in the defendant town from January, 1863, to January, 1868; that during the whole of this period he was more than twenty-one years of age; that he was an alien until November, 1864, when he became a naturalized citizen; that in May, 1867, his wife became an insane pauper, and was with his consent committed to the State Lunatic Hospital; and that in January, 1868, he ceased to be a resident of the defendant town. *Held*, that, by the St. of 1868, *c.* 328, § 1, as amended by the St. of 1871, *c.* 379, § 1, the husband of the pauper acquired a settlement in the defendant town.

The St. of 1868, *c.* 328, § 1, as amended by the St. of 1871, *c.* 379, § 1, relating to the settlement of paupers, is constitutional.

CONTRACT by the treasurer of the Commonwealth for the amount paid by the Commonwealth to the State Lunatic Hospital at Northampton, for the support of Bridget Sheehan, an insane pauper. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, the material parts of which appear in the opinion.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the plaintiff.

J. G. Abbott, for the defendant.

COLT, J. This action is brought to recover for the support of an insane pauper whose settlement is claimed to be in Hopkinton. The only question is, whether Thomas Sheehan, the husband of the pauper, gained a settlement in that town, where he resided on a freehold estate from 1863 to 1868, being over twenty-one years of age. He was an alien until November, 1864, when he became a naturalized citizen. In May, 1867, his wife became an insane pauper and was with his consent committed to the state hospital. In January, 1868, he ceased to be a resident of Hopkinton. Thus it appears that for nearly all of the first two of the five years' residence he was an alien, and for the last two years or more, he was receiving aid as a pauper.

Under the Gen. Sts. *c.* 69, § 1, *cl.* 4, a settlement by living on a freehold estate for three successive years could be acquired only by a citizen of one of the United States. And, under the decisions of this court, the assistance received by him through

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his wife as a pauper in May, 1867, terminated the effect to be given to his residence after that time. *Charlestown* v. *Groveland*, 15 Gray, 15. *Woodward* v. *Worcester*, 15 Gray, 19, note. *West Newbury* v. *Bradford*, 3 Met. 428.

If the General Statutes had been in force, Sheehan could not have acquired a settlement because there was not three successive years' occupancy of the freehold as a citizen, without aid as a pauper. But by the St. of 1871, *c.* 379, amending the St. of 1868, *c.* 328, it is provided that thereafter any person having the qualifications named in the fourth clause, (which is the clause providing for the gaining of a settlement in the mode we are considering,) shall be deemed to have thereby gained a settlement, although not a citizen of any of the United States, "whether such other qualifications shall have been acquired before or after the enactment hereof."

The manifest purpose of these last acts is to remove all disability, arising from alienage, from one who, under the former provisions of law, but for the disability, would have acquired a settlement. As to the right to take, hold, transmit, and convey real estate, aliens and citizens had long enjoyed equal privileges under our statutes; Gen. Sts. *c.* 90, § 38; and there is no good reason why they should not stand on an equal footing in respect to the modes of acquiring a settlement. It would be a narrow construction to hold, that the benefits of the acts in question are confined to those, who, before their passage, had, while aliens, completed three years' ownership and occupation of a freehold, and do not enure to those who, without removing from their estates, become citizens before the end of that time and then complete the occupation. The conclusion is, that the settlement of Sheehan under these acts is established in Hopkinton.

The statutes do not violate any constitutional provision, whether they are regarded as passed in the exercise of the right to regulate a complicated part of the internal police of the Commonwealth, or in the exercise of the right to impose reasonable assessments, rates and taxes. It is clearly within the power of the Legislature to charge upon the towns and cities the support of the poor; distributing the burden by general laws applicable alike to all, and based upon benefits derived from previous residence, payment of taxes, occupancy and ownership of land, mil-

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itary or official service, and the like. The rules of settlement are frequently, perhaps too frequently, changed, so as to impose new and unexpected burdens on the towns. Of the wisdom of such changes the Legislature must alone judge. It is enough for us, when they are called in question in any case, to declare that they impair or do not impair vested constitutional rights. Sts. 1870, *c.* 392; 1872, *c.* 280. *Bridgewater* v. *Plymouth*, 97 Mass. 382. *Goshen* v. *Richmond*, 4 Allen, 458.

Judgment affirmed.

JOSEPH G. BANNISTER *vs.* COUNTY OF MIDDLESEX.

Middlesex. Jan. 10. — Oct. 17, 1878. AMES & LORD, JJ., absent.

The St. of 1874, c. 35, § 17, empowering the First District Court of Southern Middlesex to "appoint all officers necessary for the transaction of the business of the court," does not authorize the appointment of an officer, whose services are to be paid for by the county, to attend the daily sessions of the court for criminal business.

CONTRACT upon an account annexed, by a deputy sheriff, for attendance upon the First District Court of Southern Middlesex. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, the material parts of which appear in the opinion.

L. H. Wakefield, for the plaintiff.

G. Stevens, for the defendant.

COLT, J. The St. of 1874, *c.* 35, by which the First District Court of Southern Middlesex is established, provides, in § 1, that said court shall "have the same jurisdiction, power and authority, shall perform the same duties, and be subject to the same regulations, as are provided in respect to existing police courts by chapter 116 of the General Statutes, and by all general laws passed in amendment thereof, applicable to the several police courts of the Commonwealth, and all provisions of law relating to criminal and civil proceedings, the taxation of costs, the payment of fines, the expenses of court, the accounting and settling with county and towns for money paid into the court as forfeit-

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ures or otherwise, and all other returns and requirements of law applicable to the several police courts of the Commonwealth."

By the Gen. Sts. *c.* 116, §§ 10, 11, 12, police courts are given the same jurisdiction as justices of the peace have, in all matters relating to crimes committed in their respective districts; and their proceedings in the hearing, trial and determination of cases, and all matters relating thereto, it is declared, by § 11, "shall be substantially the same, and the fees and costs shall be the same, as in like cases before justices of the peace."

The plaintiff, a deputy sheriff, was appointed by the justice of the First District Court of Southern Middlesex an officer of the court, to attend its daily criminal sessions, because, in the judgment of the justice, such service was necessary in transacting the business of the court; and, according to the case stated, it was agreed between the said justice and the plaintiff, that the latter should receive for his services two dollars a day, to be paid by the county. The amount for which this action is brought was duly certified by the justice to the county treasurer, and payment refused. The service was rendered by the plaintiff before the passage of the St. of 1876, *c.* 196, which prohibits compensation for any such service in police and district courts.

The plaintiff contends that he was legally appointed to perform the required service, under § 17 of the St. of 1874, *c.* 35, which gives to the court the power to "appoint all officers necessary for the transaction of the business of the court;" and that, upon the certificate of the justice, he is entitled to his pay. But it was plainly not intended by this provision to give to the magistrate unrestrained power to appoint a deputy sheriff, solely to attend the criminal sessions of his court, for whose services, when certified, the county would be liable. The judgment of the justice is not conclusive on the question whether the service rendered was necessary. In deciding that question, the provision relied on must be construed with reference to the more prominent provisions of the act itself, above stated, which carefully restrict the power of the court in respect to the allowance of expenses, fees and costs, to the powers of justices of the peace and police courts; and also with reference to other general provisions of the statutes which fix the compensation of officers for attendance upon all the courts of the Commonwealth, and are

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intended to cover the whole ground. Gen. Sts. c. 157, §§ 4, 5; c. 120, §§ 21, 22; c. 116. Sts. 1862, c. 102; c. 216, §§ 9–11, 13–15; 1866, c. 190; 1872, c. 331; 1873, c. 222; 1876, c. 215.

A marked illustration of the disposition of the Legislature in this respect is afforded by the fact that, on the day of the passage of the act in question, a statute was passed relating to district courts generally, in which it is specially provided that deputy sheriffs shall be paid for attendance upon those courts at sessions for trials by jury, with no other provision for such service. St. 1874, c. 36. The manifest purpose is to leave the matter of attendance on the criminal sessions of the district courts to be governed by the rules which governed justices of the peace. By the St. of 1862, c. 216, § 9, which is entitled "An act concerning officers' fees in criminal cases," and is full and complete in all its provisions, officers are allowed, for attending before a justice of the peace or police court, in criminal cases, and keeping the prisoner, one dollar per day, to be taxed on one warrant only. In such cases, and at all criminal sessions of police or district courts where there is any case for trial, there is always an officer present in charge of the prisoner, who is entitled to this allowance for attendance. It is not to be supposed that it was the purpose to provide for the appointment of another officer, whose attendance had never been required before justices of the peace or police courts, and whose services in that capacity cannot be necessary to the transaction of the criminal business of the court. Whatever may be the extent of the authority conferred by the clause relied on, it is enough that it does not authorize this appointment.

The plaintiff relies on the provision of the Gen. Sts. c. 157, § 4, which gives to deputy sheriffs a fixed sum for attendance on a court of record, or a meeting of the county commissioners. But this was intended to fix the compensation, and not as a requirement that such service shall or may be rendered in all courts of record; that is left to other provisions of law, or to immemorial usage. *Judgment affirmed.*

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AMBROSE M. CUSHING *vs.* INHABITANTS OF BEDFORD.

Middlesex. Jan. 16. — Oct. 17, 1878. ENDICOTT & SOULE, JJ., absent.

Under the St. of 1872, *c.* 84, authorizing selectmen of towns to establish drinking troughs within the public highways, the selectmen act as a board of public officers, and not as agents of the town; and a vote of a town, "that the selectmen be instructed to establish a public watering trough" in a certain locality, is irregular and unauthorized; and if, in pursuance of this vote, the selectmen put up a trough, painted of a brilliant color and of such a character as to frighten horses, the town is not liable for an injury solely occasioned thereby.

In an action for personal injuries occasioned to the plaintiff by reason of a defect in a highway, there was evidence that there was a hole in the highway into which the plaintiff's carriage entered, and by reason of which it was overturned; that on the side of the road there was a drinking trough, painted of a brilliant red color, and of such a character that it would and did frighten steady horses; and that it frightened the plaintiff's horse, causing him to spring to one side of the road and to strike the defect in the road while so shying, and occasioning the injuries complained of. It was not contended that the carriage would have struck the defect had it not been for the shying of the horse from fright. *Held*, that the evidence would justify the jury in finding that the defect in the highway was the sole, direct and efficient cause of the injury.

TORT. Writ dated July 1, 1875. The first count of the declaration was as follows: "And the plaintiff says there is in the town of Bedford a public highway, leading from said town of Bedford to the town of Lexington, which said defendant is bound to keep in repair; that the same was negligently suffered by the defendant to be out of repair, whereby the plaintiff travelling thereon, and using due care, was hurt. And the plaintiff says he was travelling on said highway in his buggy, with his wife, and was driving, in the exercise of due care, a quiet and safe horse; that at a certain place in said highway a water trough, painted of a brilliant color, had been placed, and placed in such a position that the road opposite said trough was made more narrow than it had been before said placing of said trough; that as the horse approached said brilliantly painted trough, he sheered; that said horse in sheering drew said buggy upon a defect in said public highway, which defect was on that side of said highway which was opposite to said water trough; that said buggy was overturned by reason of said defect, and said plaintiff was thrown out and greatly injured thereby."

The second count was as follows: "And the plaintiff says the defendant negligently placed and allowed to remain for a long

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time, within the limits of a highway in said town of Bedford, a pump and water trough, painted of a bright red color, and of such a description that it was calculated to, and did, frighten horses travelling by the same upon said highway; that the plaintiff, with his wife, was travelling along said highway, and past said trough and pump, in his carriage, drawn by a quiet horse, and the plaintiff was using due care; that the plaintiff's horse was frightened by said pump and water trough, and sprang away from the same in such a manner as to overturn the plaintiff's carriage and greatly injure said plaintiff."

The answer admitted that the defendant was bound to keep the highway in repair; left the plaintiff to prove care on his part; denied that he was injured as alleged, and that the highway or any part thereof was out of repair, and that any structure was placed in the highway by the defendant, and that there was any combination of any structure and any imperfect condition of the highway to cause an obstruction or defect in the highway; and denied that by means of any such combination the plaintiff was hurt.

Trial in the Superior Court, before *Wilkinson*, J., who reported the case for the consideration of this court, in substance as follows: Under the first count of the declaration, the plaintiff offered evidence tending to show that there was a hole in the road into which his carriage entered, and by reason of which it was overturned. But it appeared that the horse was frightened by a watering trough on the side of the way, and sprang to one side of the road in his fright, and struck the defect while so shying. The plaintiff did not contend that the carriage would have struck the defect, had it not been for the shying of the horse from fright.

Under the second count, the plaintiff proved that at a regular meeting, under an article in the warrant, "To see if the town will raise money for the establishment and maintenance of public drinking troughs in the public highways," the defendant town voted, "That the selectmen be instructed to establish a public watering trough near the Lexington line, and that the expense does not exceed twenty-five dollars."

The plaintiff contended that, immediately after this vote, the selectmen set up the trough in the mode it was at the time of

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the accident; that the structure was painted of a brilliant red color, and was of such a character that it would and did frighten steady horses; that it frightened the plaintiff's horse, and caused him to jump aside and overturn the carriage and cause the injuries complained of.

The judge ruled that the plaintiff could not recover upon either count of the declaration; and, by consent of parties, reported the case for the consideration of this court. If the action could not be maintained, judgment was to be entered for the defendant; otherwise, the case was to stand for trial under such directions as the court should give.

T. H. Sweetser, & *G. A. A. Pevey*, for the plaintiff.

S. Hoar, for the defendant.

COLT, J. By the St. of 1872, *c.* 84, the selectmen of towns are authorized to "establish and maintain such public drinking troughs, wells and fountains within the public highways, squares and commons of their respective towns, as in their judgment the public necessity and convenience may require;" and the towns are authorized to raise and appropriate money to pay the expense thereof. These provisions make the selectmen a board of public officers charged with this duty; they are not agents of the town, but they represent the general public. They were so considered under a similar statute, which gave them the power to certify in writing, where telegraph posts might be erected within the highway. *Young* v. *Yarmouth*, 9 Gray, 386.

The towns, in their corporate capacity, have not been given the right by statute to construct drinking troughs in the public highways, nor does it appear that they have usually exercised the right. The vote of the town instructing the selectmen in this duty and limiting the expense, was irregular and unauthorized. *Kean* v. *Stetson*, 5 Pick. 492. The town cannot therefore be charged with having created a nuisance, from which the plaintiff suffered special injury; and no recovery can be had on the second count in the declaration.

In support of the first count, which was for an injury caused by a defect in the highway, there was evidence that the plaintiff's horse was frightened at a red watering trough on the side of the road, shied from his course and caused the carriage to go into a hole in the road, by which it was overturned and the

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plaintiff injured. It was not contended that the injury would have happened if the horse had not shied. The jury on this evidence would be justified in finding that the plaintiff's loss of the control of his horse was momentary or partial. *Titus* v. *Northbridge*, 97 Mass. 258. *Babson* v. *Rockport*, 101 Mass. 93. They would be justified in finding that the shying of the horse was as much an accident as the failure of some part of the carriage; *Palmer* v. *Andover*, 2 Cush. 600; or as when the fright was caused by an accumulation of ice about a watering tub; *Stone* v. *Hubbardston*, 100 Mass. 49; or by a pile of stones by the roadside. *Bemis* v. *Arlington*, 114 Mass. 507.

They would be justified in finding that at the place where the injury was received, which may have been some distance from the red watering trough, the plaintiff, while passing on the highway, using due care and having at least partial control of his horse, was injured by a defect in the highway which was the direct, sufficient and sole cause of his injury. It cannot be declared, as a matter of law, that the cause of the fright of the horse, producing the unexpected movement by which the carriage in the end went into the hole, was one of the direct and immediately contributing causes of the plaintiff's injury.

Case to stand for trial on the first count only.

CITY OF CAMBRIDGE *vs.* COUNTY COMMISSIONERS OF MIDDLESEX.

Middlesex. Jan. 17. — Oct. 17, 1878. ENDICOTT & SOULE, JJ., absent.

A city laid out a street in 1861, and within two years constructed it, and opened it to public travel, without making its grade conform to that established in the order of location; made repairs thereon nearly every year thereafter; in 1873, laid water pipes, and in 1874, built a sewer in the street, both with reference to the existing grade; and in 1877, changed the grade so as to conform to that fixed in the original order. *Held*, that this change of grade was not a part of the original construction of the street, and that it entitled an abutter to compensation for the injury occasioned thereby.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners of Middlesex in issuing a warrant for

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a jury to assess the damages caused to land of Eliza H. Marvin by changing the grade of Walden Street in Cambridge.

Hearing on the petition and answer, and agreed facts, before *Ames*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

J. W. Hammond, for the petitioner.

C. Robinson, Jr., for the respondents.

COLT, J. Walden Street, in Cambridge, was laid out in 1861 by the city council, and the order of location established the grade at which it was to be constructed. Within two years, the street was constructed and opened to public travel by the city, and it has ever since been so used; but it was not then graded so as to conform to the grade established in the order. In the early part of 1877, some sixteen years after the street was laid out, the existing grade of the street was made to conform to the order of location.

Eliza H. Marvin, who owned land abutting on the street, applied to the mayor and aldermen of Cambridge for damages sustained by her by the change of grade in 1877, and was awarded some damages under the Gen. Sts. *c.* 43, § 19. She was dissatisfied with the amount allowed her, and applied to the county commissioners for a jury, and a warrant for a jury was issued by their order.

The petitioner contends that the order for a jury is illegal and erroneous, because the change of grade complained of was a part of the construction of the street under the order laying out the same; while the respondents contend that it was a new change of grade within the provisions of the Gen. Sts. *c.* 44, §§ 19, 20.

We are of opinion that, upon the facts agreed, the work done in 1877 by the surveyors of highways and agents of the city cannot be fairly treated as done under the original order of construction. For many years, repairs had been annually made upon the street as upon a constructed and completed road, water pipes were laid by the city adapted to the actually existing grade in 1873; and, in 1874, a sewer, with openings and cesspools, was built with like reference to the grade as it then was. There was great lapse of time between the date when the road was originally constructed and opened for travel, under the order of location, and the date when the grade was raised as complained of.

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The title to the estate claimed to have been damaged may have changed hands many times. There was no evidence that the present owner had ever received any compensation for her damages, or that the delay in constructing the street according to the original order and plan was for the accommodation, or with the consent, of the landowner. The fair inference is, that the original construction in 1861, and the subsequent repairs made in 1877, were independent proceedings. *Snow* v. *Provincetown*, 109 Mass. 123.

The facts in this case distinguish it from *Brady* v. *Fall River*, 121 Mass. 262. In that case the street, which was laid out in 1870, had long before that been used and travelled upon by the public. A new grade was established by the order of location, but it appeared that nothing was done upon the street, in the way of raising it, until July, 1874, when it was ordered that the superintendent of streets cause the street to be worked to grade. It does not appear that there was any construction of the street attempted, or any act of opening it by the city to the public travel, before that time. It remained in the condition in which it was before it was laid out, and was used by the public in that condition. The facts in that case would not authorize the abutters to consider the construction completed before the grade was raised in 1874. *Lowell* v. *French*, 6 Cush. 223. *Williams* v. *Cummington*, 18 Pick. 312. *Lincoln* v. *Worcester*, 122 Mass. 119.

In this view of the case, it is unnecessary to decide whether, at this stage of the proceedings, the proper remedy of the city, for the alleged error of the county commissioners in ordering this warrant to issue, would be by writ of certiorari.

Petition dismissed.

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William B. Kendall *vs.* Bay State Brick Company.

Middlesex. Jan. 11, 1877. — Oct. 18, 1878. Colt, Ames & Soule, JJ., absent.

Under a declaration alleging that the defendant placed divers large quantities of wood, coal, refuse bricks, mortar, rubbish and of impure water, upon the plaintiff's close, and there kept and continued them until the commencement of the action, but not alleging that the trespass was committed on divers days and times, evidence of two distinct and independent trespasses is inadmissible.

Tort. Writ dated February 17, 1875. The declaration contained two counts. The first count alleged that the defendant forcibly broke and entered the plaintiff's close, describing it by metes and bounds, "and put, placed and laid divers large quantities of wood, coal, refuse bricks, mortar and rubbish upon the said close, and placed and poured, and caused to be placed and poured, great quantities of impure water upon the said close, and there kept and continued the said wood, coal, bricks, mortar, rubbish and impure water, without the leave or license and against the will of the plaintiff, for a long time, and until the commencement of this suit, and thereby greatly incumbered the said close, and prevented the plaintiff from having the use, benefit and enjoyment thereof."

The second count alleged that the defendant forcibly entered a certain other close of the plaintiff, describing it by metes and bounds, and concluded as the first count.

At the trial in the Superior Court, before *Putnam*, J., it appeared that the different counts were for the same trespass, upon the separate lots; that the plaintiff was the owner of these lots, having purchased them in July, 1856, and that the defendant was a corporation, manufacturing brick, upon the opposite side of Hall Street, in East Medford.

The plaintiff offered evidence of a trespass, of the character named in the declaration, committed in the year 1857, and that some persons had been seen wheeling bricks, mortar and lumber from the premises opposite, and dumping the same upon the plaintiff's land. The plaintiff then proposed to offer evidence of another trespass, committed at a time within the period of the statute of limitations. To this the defendant objected, but the judge admitted the evidence *de bene esse*, and the plaintiff offered

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evidence under the first and second counts, tending to show a trespass of a similar character, committed by the defendant some four or five years ago.

At the close of the plaintiff's testimony upon this point, the defendant called upon the plaintiff to elect upon which trespass he would rely. The plaintiff contended that he had a right to rely upon both the trespasses. But the judge ruled that, the declaration not alleging a trespass with a *continuando*, but only that the defendant had "kept and continued" upon the land the materials that it had deposited at the time of the trespass alleged, the plaintiff could not go the jury upon both trespasses.

The plaintiff then elected to go to the jury upon the first trespass, and, in order to avoid the effect of the statute of limitations, offered evidence tending to show that the coal, brick, mortar, rubbish and other materials which had been put upon the plaintiff's land at the time of the first trespass, had been allowed to remain upon the land until the time of the bringing of this action. It appearing, however, from one of the plaintiff's witnesses, that the defendant was not incorporated until the year 1863, and that, before that time, the brick-yard was carried on by others, and the defendant had nothing to do with the premises in question up to that time, and did not do the acts committed in 1857, and there being no evidence to control this, the judge ruled that the plaintiff could not recover on account of the first trespass, ordered a verdict for the defendant, and reported the case for the consideration of this court. To the several rulings of the court the plaintiff excepted. If the rulings were correct, judgment was to be entered on the verdict; otherwise, a new trial was to be granted.

R. Gray & H. W. Swift, for the plaintiff.

A. A. Ranney, for the defendant.

GRAY, C. J. At common law, in trespass *quare clausum fregit*, several rules were well settled: First. If a single trespass upon a single day was relied on, a time must be alleged, but need not be proved. Second. In order to enable the plaintiff to prove trespasses on more than one day, it was necessary, if the trespass was in its nature capable of continuance, (as where the cattle of the defendant trampled and spoilt the grass of the plaintiff for several days,) to allege that it was continued from

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the day named to another day — which was called alleging the trespass with a *continuando;* or if the trespasses were of a kind which, when once done, were completed, and could not be continued, (as in the case of cutting down trees,) to allege that the defendant committed them on divers days and times, *diversis diebus et vicibus;* and unless the declaration, in one of these forms, showed the intention of the pleader to rely upon more than a single trespass, no more could be given in evidence. Third. If a trespass was alleged to have been committed on one day, and thence, either continuously, or on divers days and times, to another day, the plaintiff, if he relied on a single trespass only, was not confined to any particular day, and might prove it to have been done even before the first day alleged; but he was not permitted to give evidence both of a trespass within the time alleged, and of a trespass at another time. Bac. Ab. Trespass, K. Bul. N. P. 86. *Hume* v. *Oldacre*, 1 Stark. 351. *Pierce* v. *Pickens*, 16 Mass. 470.

By the new practice act, no averment need be made which the law does not require to be proved. St. 1852, *c.* 312, § 2, *cl.* 2. Gen. Sts. *c.* 129, § 2, *cl.* 2. It follows that, when the plaintiff relies upon a single trespass, no time need be alleged. *Knapp* v. *Slocomb*, 9 Gray, 73. The form given at the end of the practice act appears to be intended for an ordinary case, and not as suitable for all cases; and the taking of personal property, as therein alleged, is mere aggravation of the trespass upon the land. *Eames* v. *Prentice*, 8 Cush. 337. The provision of the Gen. Sts. *c.* 129, § 6, requiring a description of the plaintiff's close, is not a reënactment of any provision of the new practice act, but of the earlier St. of 1839, *c.* 151, § 3, and does not affect this case.

The rules of evidence are expressly declared not to be changed, except so far as specially provided. St. 1852, *c.* 312, § 6. Gen. Sts. *c.* 129, § 81. *Robinson* v. *Austin*, 2 Gray, 564. *Powell* v. *Bagg*, 15 Gray, 507. *Parsons* v. *Smith*, 5 Allen, 578. In *Powell* v. *Bagg*, it was accordingly held that since the practice act, as at common law, when a trespass was alleged to have been committed on one day, and thence, either continuously or at divers days and times, to another day, the plaintiff, if he relied on a single trespass, was not confined to any day, but might

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prove it to have been committed even before the first day alleged; but if he relied on continuous or repeated trespasses, he was limited to the period alleged in the declaration.

The practice act having made no change in the rules of pleading in regard to actions for trespasses on land, except so far as to dispense with allegations which the common law did not require to be proved, and not having changed the rules of evidence, it follows that, unless the plaintiff alleges that the defendant trespassed continuously, or that he trespassed on divers days and times, (as the facts of the case may require,) he must be confined in his proof to a single act of trespass; and, if he alleges that the trespass was continuous, he cannot prove two or more distinct and independent trespasses.

To hold that any change has been made in this respect would be inconsistent with the whole spirit and policy of the practice act, which, while dispensing with needless and embarrassing technicalities, requires full and distinct notice of the charge which the defendant is to meet; and would disregard the direction that the allegations and denials of each party shall be so construed by the courts as to secure, as far as possible, substantial precision and certainty, and to discourage vagueness and loose generalities. St. 1852, *c.* 312, § 26. Gen. Sts. *c.* 129, § 27.

At the trial of this case, the plaintiff relied on the first and second counts in the declaration, each of which alleged that the defendant put, placed and laid divers large quantities of wood, coal, refuse bricks, mortar and rubbish, and placed and poured great quantities of impure water, upon the plaintiff's close, (different closes being described in the two counts,) and there kept and continued the same for a long time, and until the commencement of this suit. The original trespass was certainly well alleged, and the declaration could not therefore have been demurred to. *Chamberlain* v. *Greenfield*, 2 W. Bl. 810; *S. C.* 3 Wilson, 292. And we may assume that each count was sufficient to warrant the admission of evidence that the defendant, up to the time of the bringing of this action, had continued upon the plaintiff's land the materials which had been placed there at the time of the first trespass. *Holmes* v. *Wilson*, 10 A. & E. 503. *Percival* v. *Stamp*, 9 Exch. 167. The plaintiff was allowed at the trial to introduce such evidence, and did not insist

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at the argument upon his exception to the ruling of the court thereon.

But neither count alleges that the trespass was committed on divers days and times, or in any manner shows that the defendant trespassed on the plaintiff's close at more than one time. The allegation is only that the defendant placed divers large quantities of wood, coal, refuse bricks, mortar and rubbish, and of impure water, upon the plaintiff's close, and there kept and continued them. This does not show that the defendant repeated or renewed its trespass.

The only exception upon which the plaintiff relies is to the ruling of the court that he could not, under these counts, go to the jury upon a trespass, of the character therein alleged, committed eighteen years before, and also upon a trespass of a similar character committed some four or five years ago. These two trespasses were clearly distinct and independent, and could only be given in evidence under distinct counts, or under a count which charged trespasses committed at different days and times. The ruling excepted to was therefore correct. *Sutcliff* v. *Constable*, 1 Brownl. 222, 224. *Clayton* v. *Gillam*, 1 Ventr. 363. *Monckton* v. *Pashley*, 2 Ld. Raym. 974; *S. C.* 2 Salk. 638; Holt, 697; 6 Mod. 38. Vin. Ab. Trespass, I. 2, pl. 6, 7.

Judgment on the verdict.

SAMUEL C. HILLS *vs.* JONATHAN B. SIMONDS.

Middlesex. January 25. — October 18, 1878.

A testator, by his will, devised the residue of his estate to trustees, in trust to pay the income to his son for life, and, on his death without issue, to be divided among his nephews and nieces, the children of certain brothers and sisters, during their natural lives, "and after their decease to be equally divided among their children or their legal representatives." The son died without issue, and no nephews or nieces were born after the testator's death. *Held*, that such a nephew or niece born after the testator's death would have been entitled to share with the nephews and nieces then living; that the limitation over to the children or legal representatives of the nephews and nieces living at the testator's death was not void for remoteness; and that the possible partial invalidity of the devise in case of the children or legal representatives of any after-born nephew or niece would not defeat the devises to the children or legal representatives of the living nephews and nieces.

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MORTON, J. This is a bill in equity brought to set aside a deed executed by the plaintiff to the defendant, upon the ground that it was obtained by fraud. The defendant demurs to the bill on several grounds, one of which is that the bill does not show that the plaintiff is entitled to the relief sought; and the case has been reserved for our consideration on the bill and demurrer.

The deed, executed by the plaintiff in 1874, purports to convey to the defendant all the interest of the plaintiff in the estate, real and personal, of which Jonathan Simonds died seised or possessed.

The will of Jonathan Simonds, who died in 1834, after certain devises to trustees for the benefit of his sons, George W. and Albert, provides that "in case both my sons, George W. and Albert, should die without issue, my will is that all the residue of my real estate hereinbefore limited, appointed and devised, and all my other estate, real and personal, be divided among my nephews and nieces as follows, to wit, the children of my brother Joshua, my brother William, my sister Martha Merriam and my sister Elizabeth Parker, during their natural lives, and after their decease to be equally divided among their children or their legal representatives."

It appears that the testator's two sons survived him; that Albert died intestate in 1861, and George W. in 1871, neither having had issue; that the testator's brothers and sisters named in the will were all living at his death, but all died before George W.; that none of their children were born after the death of the testator; that twenty-three children of the brothers and sisters named in the will were living at the testator's death, of whom eleven were living at the death of George W., and two of these died afterwards.

The plaintiff, a half brother of George W. Simonds, contends that the devise over to the children of the nephews and nieces is void as tending to create a perpetuity, and that the right to the remainder of the testator's estate, after the termination of the life estates of the nephews and nieces, vested in George W. Simonds, and on his death in the plaintiff, under the Gen. Sts. *c.* 91, § 5, which provide that kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

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The defendant contends that the will of Jonathan Simonds lawfully disposed of the whole of his estate; that the plaintiff had no interest therein; and, therefore, that his deed conveyed nothing.

This question depends upon the construction to be given to the clause of the will above cited. This complicated will has been several times before the court for adjudication, and we think the previous decisions go far towards settling the question presented in this case. *Simonds* v. *Simonds*, 112 Mass. 157. *Simonds* v. *Simonds*, 121 Mass. 191. *Merriam* v. *Simonds*, 121 Mass. 198. As we have before intimated, we are of opinion that, under the will of his father, George W. Simonds took an estate for life in the property devised for his benefit. In *Merriam* v. *Simonds*, *ubi supra*, it was held that this devise was to a class, who were to take life estates upon the death of George, that those took under it who constituted the class at the death of the testator, and therefore that each nephew and niece belonging to the class took an interest which vested at the death of the testator. It was also held that the devise over to "their children or legal representatives" was a devise to the children or legal representatives of each individual life tenant as his estate terminates by his death, the words "after their decease" being construed as meaning "upon the death of each life tenant."

It has not been necessary, in either of the previous cases, to determine whether the devise to the nephews and nieces would have opened to let in nephews and nieces born after the death of the testator, if there had been any who belonged to the class described in the devise. It would seem that as the testator made a gift to a class of persons, and fixed a time for the distribution and enjoyment at a period beyond the time of his death, those who come within the description at the time of the distribution would be included, and therefore that after-born nephews and nieces falling within the class would have been entitled to share with the nephews and nieces living at the death of the testator. *Hall* v. *Hall*, 123 Mass. 120, & cases cited. Assuming this to be so, the question is presented whether this devise, in whole or in part, violates the rules of law against perpetuities, and if so, to what extent and with what effect. It has been decided that the devise of life estates to the nephews and nieces was not void

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for remoteness. *Simonds* v. *Simonds*, 112 Mass. 157. It is clear that the limitation over to the children or legal representatives of each nephew or niece living at the death of the testator, at his or her decease, is not void for remoteness. The latest period, at which the estate devised must revest, is the end of the lives of their respective ancestors, the tenants for life, which period, is the end of a life in being at the death of the testator. But it is equally clear that the limitation over to the children or legal representatives of after-born nephews or nieces would be void for remoteness. The share of each of such children or legal representatives would not vest until the death of his parent who was not in being at the death of the testator, and this would not necessarily be within a life or lives in being and twenty-one years after the death of the testator. Construing this devise as at the death of the testator, and having regard to possible events, it is true that the devise would be void for remoteness so far as the limitation over to the children or legal representatives of an after-born nephew or niece is concerned. The question is, What is the effect of this possible partial invalidity upon the limitation to the nephews and nieces living at the death of the testator and to their children or legal representatives?

This case does not fall within the rule that, where a devise is given to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, and is therefore incapable of taking, the whole devise is void. *Leake* v. *Robinson*, 2 Meriv. 363. *Hall* v. *Hall*, *ubi supra*. In such cases, the person incapable of taking may be the sole representative of the class at the time the estate is to vest, and thus it is possible, at the death of the testator, that the whole estate may vest at a period too remote. But, in the case at bar, the limitation over upon the death of the several nephews and nieces, is not a devise to a single class, of which a child of an after-born nephew or niece may be a member. It is, in legal effect, equivalent to several and distinct devises to different classes. The children or legal representatives of each nephew or niece form a distinct class who respectively take the separate share of the estate in which their ancestor had a life interest. It is the same, in effect, as if the testator had made separate devises to each nephew

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and niece living at his death, with a limitation over to their respective children or legal representatives, and also a devise to any nephew or niece who might be born after his death and before the death of George, with a like limitation over. The latter limitation over would be void for remoteness, but this would not defeat the devises to the nephews and nieces living at the death of the testator and to their children or legal representatives.

Suppose a nephew had been born after the death of the testator and before the death of George, thus making the class who were to take life estates after the death of George to consist of twenty-four instead of twenty-three members. Such after-born nephew would take a life estate in one twenty-fourth part, because that must vest in him, at the latest, at the death of George. But the limitation over to his children or legal representatives would be void. Such invalidity, however, would not divest or defeat the devises to the children or legal representatives of the other twenty-three nephews and nieces, who take separately and independently shares which must be ascertained within the legal limits. In the case supposed, the only part of the testator's estate undisposed of by his will, which would go to his heirs at law, would be the remainder in one twenty-fourth part after the death of the after-born nephew.

In the case at bar, there were in fact no after-born nephews or nieces. There were twenty-three nephews and nieces, answering the description of the devise, living at the death of the testator. Each of these, on the death of the testator, took an immediate vested estate for life in one twenty-third part expectant on the death of George, with remainder in fee to their respective children or legal representatives, subject to have their respective estates divested in part, in case there were any after-born nephews or nieces belonging to the class described. The exact share or estate, which each was to have, was necessarily to be ascertained, and fixed at the death of George. In any contingency, the share which the testator intended to give to the children or legal representatives of his living nephews and nieces must be ascertained, and vest within the legal limits. We are of opinion that the possible partial invalidity of the devise, in case of any after-born nephews or nieces, does not defeat the devises to the children or legal representatives of the living

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nephews and nieces, but that they take according to the terms of the will. *Cattlin* v. *Brown*, 11 Hare, 372. *In re Moseley's trusts*, L. R. 11 Eq. 499, 504.

It follows that there was no estate of the testator undisposed of by the will, and therefore that the plaintiff has no interest to set aside the deed to the defendant alleged to be fraudulent.

Demurrer sustained, and bill dismissed.

C. R. Train & J. O. Teele, for the defendant.

R. M. Morse, Jr. & R. Stone, Jr., (*C. P. Greenough* with them,) for the plaintiff.

THOMAS J. GIBBINS *vs.* LUTHER E. SHEPARD & others.

Middlesex. January 15. — October 19, 1878.

A will contained the following clause: "After payment of my just debts and funeral expenses, I give and devise to my wife one third of all my real estate to her sole use and behoof forever, together with all the furniture or personal property now in the house, and the other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve." The personal estate was insufficient to pay the debts and funeral expenses, and the administrator with the will annexed sold the real estate, and had a sum remaining in his hands after paying such debts and expenses. *Held*, that the wife took an estate in fee in one third of the residue; that, as to the other two thirds, she took at least an estate for life, with a power to convey the fee and to receive the proceeds; that she was entitled to the residue of the proceeds in the administrator's hands, and to use them at her discretion for her support; and that no trust was created by the will in favor of the children.

An executor, desiring to obtain the instructions of the court, should bring a bill in equity, and not a petition.

PETITION IN EQUITY, by Thomas J. Gibbins, administrator with the will annexed of Thomas Gibbins, to obtain the instructions of the court.

The petition alleged that the testator, who died on June 7, 1876, left a will, which was duly admitted to probate on December 4, 1876, and contained the following clauses:

"First. I hereby constitute and appoint my wife Elizabeth Gibbins to be sole executrix of this my last will, directing my said executrix to pay all my just debts and funeral expenses,

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and to settle my estate, whether real or personal, as hereinafter mentioned.

"Second. After payment of my just debts and funeral expenses, I give and devise to my said executrix one third of all my real estate, to her sole use and behoof forever, together with all the furniture or personal property now in the house, and the other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve."

The petition further alleged that the testator did not leave sufficient personal property to pay debts and funeral expenses; that his real estate had been sold under a license from the Probate Court for that purpose; that after the payment of the debts and funeral expenses, there remained in the hands of the administrator the sum of $1521.42, as the balance of the proceeds of such sale; that the testator left four children, of whom the petitioner was one, and a widow, the executrix named in the will, who had since been adjudged an insane person, and the defendant Shepard had been appointed her guardian; and that the true construction of the will was so doubtful as to need the aid and direction of this court to determine the same, and the petitioner's duties concerning the estate, and the rights of the several parties interested therein. The instruction of the court was requested, after such notice to the parties as to the court should seem best, as to whether the balance in the hands of the administrator should be paid to the wife of the testator, or only one third thereof and the income of the other two thirds, retaining said two thirds in his hands during her lifetime.

Notice was ordered to be served on all the parties interested. The petition was afterwards ordered to be taken *pro confesso* as to all except the guardian of the widow, who appeared and filed an answer, admitting the allegations of the petition; and the case was reserved by *Soule*, J., on the petition and answer, for the consideration of the full court.

G. Stevens, for the guardian of the widow.

J. F. McEvoy, *contra*.

SOULE, J. The moneys in the hands of the administrator are the proceeds of real estate of his testator, sold for the payment

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of debts, remaining after such payment. He is responsible for the proper disposition of them, and therefore entitled to ask the instruction of this court as to the true construction of the will under which he is acting. His application contains no prayer for process, and is in the form of a petition rather than of a bill in equity; but as no objection was made by the defendants to the maintenance of the proceedings on this ground, and as any deficiency in this regard is open to amendment; *Belknap* v. *Stone*, 1 Allen, 572; we refer to the matter only for the purpose of saying that the proper practice is to proceed by bill, in the regular form.

The case presents a single question of construction. In determining it, we must ascertain, if possible, the intention of the testator, and give effect to that intention, unless prevented by some established rule of law.

As to one third part of the residue of the estate after payment of the debts and expenses of administration, it is clear that the widow takes the fee. The language of the will is apt and full thus far.

As to the remaining two thirds, the language is peculiar. "The other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve." It is contended on the part of the children of the testator, that, under this provision, the widow takes a life estate only, with a power of appointment by will among the children, at her discretion. We are of opinion, however, that this is not the true construction. The words "I leave in her power," coupled with the other language of the devise, are equivalent to the words, "with power to dispose of the same as she shall think proper." This being so, the widow took at least an estate for life, with a power to convey the fee and to receive the proceeds. *Cummings* v. *Shaw*, 108 Mass. 159. The real estate having been sold by the administrator for payment of debts, the balance of the proceeds in his hands, after such payment, must go to the person whom the will authorizes to convey the estate. If the subsequent words, enjoining the widow to divide the estate on her death on the children, make a good devise over, such devise would take effect in case of a failure by

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the widow to convey during her life. *Smith* v. *Snow*, 123 Mass. 323. But the conveyance having been made, the widow is entitled to receive the remaining proceeds, and to use them at her discretion for her support. No trust is created by the will in favor of the children. *Bamforth* v. *Bamforth*, 123 Mass. 280.

Decree accordingly.

THEOPHILUS P. CHANDLER & others *vs.* JAMAICA POND AQUEDUCT CORPORATION

Norfolk. Jan. 26. — June 28, 1878. Aug. 29. — Oct. 19, 1878.
LORD & SOULE, JJ., absent.

A statute gave an aqueduct corporation power to take land, and provided that the damages should be assessed according to the law applicable in case of land taken for public highways. A subsequent statute, giving the corporation power to take additional land, provided that, on a petition to a court for the assessment of damages for land so taken, "the cause shall thereupon proceed like other civil causes in said court." *Held*, that, in the case of land taken under the latter statute, the same rules should govern, in the assessment of damages, as applied to an assessment under the former statute.

Possession of land for many years, under a claim of title in fee, is sufficient to maintain a petition for the assessment of damages sustained by reason of the taking of the land by a corporation under the authority conferred by statute; and evidence that the petitioner had a base fee only in part of the land is inadmissible in reduction of his damages.

If, at the trial of a petition for damages for land taken by a corporation, under a statute, the judge excludes evidence offered by the respondent, that, by a reservation in a deed, it had an easement in the land taken, and admits evidence that the respondent had the same easement by prescription, and the jury deduct the value of the easement in assessing the damages, the respondent has no ground of exception to the exclusion of the evidence offered.

An easement on the surface of land, established by grant, is lost by a non-user for twenty years, united with an adverse use of the servient estate, inconsistent with the existence of the easement, under a claim of title in fee.

A grant of a right to open a parcel of land, where it may be found necessary for the purpose of laying pipes, and of liberty to keep such pipes therein forever, does not expressly or by implication grant a right to change the location of the pipes after they are once laid.

No exception lies to the refusal to give a ruling requested, which is not shown by the bill of exceptions to be pertinent to the issue.

On a petition for damages for land taken by a corporation under authority conferred by statute, interest on the amount awarded is to be assessed from the time of the taking.

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Under a statute giving the right to take land, and providing for a jury to assess the damages sustained by any person whose land is taken or injured, damages are to be assessed for the injury resulting to the adjoining land of a petitioner, although the petition sets forth only the taking of a described parcel of land, and prays for a jury to assess the damages caused by such taking.

On a petition for the assessment of damages for the taking of land, the jury may properly consider, in estimating its value, the purposes for which it may be used.

On a petition for the assessment of damages for the taking of land, the question whether a witness is competent to testify as to the value of the land taken is largely within the discretion of the judge presiding at the trial; and if such a witness is a selectman or an assessor of one town, he may properly be allowed to testify to the value of land taken in another town, near the boundary line between the two towns.

On a petition for the assessment of damages for the taking of land, a witness may be asked, on the question whether he is qualified to testify to the value of the land taken, whether he has not frequently been called as a witness to the value of land in land-damage cases.

On a petition for the assessment of damages for the taking of land under a statute authorizing the erection of a dam on the land taken, a witness, acquainted with the value of lands in the vicinity, and who is a civil engineer, and has made examinations of dams and waterworks, may properly be allowed to testify to the extent to which the dam, if built to the height allowed by the statute, would injure the remaining land of the petitioner.

PETITION to the Superior Court, filed April 11, 1873, for a jury to assess damages sustained by the petitioners by reason of the taking, on April 28, 1870, by the respondent, under the St. of 1868, *c.* 182, of about 100,000 feet of land in West Roxbury.

After the former decision, reported 122 Mass. 305, the case was tried in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions alleged by the respondent, the material parts of which appear in the opinion.

The case was argued in January, 1878, by *M. Williams, Jr.*, for the respondent, and *A. D. Chandler*, for the petitioners; and judgment was afterwards ordered overruling the exceptions. The respondent thereupon moved for a rehearing, and this motion was argued in August, 1878.

MORTON, J. The St. of 1868, *c.* 182, authorizes the respondent corporation, "for the purpose of better supplying fresh water, and for saving and restraining the water that may percolate from Jamaica Pond into what was formerly known as Spring Pond, in land now owned by said corporation, to take, hold or purchase any land near or adjoining said land, now owned by said corporation," and empowers the corporation to

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"enlarge said pond, formerly called Spring Pond, and raise a dam on said land taken or purchased, to such height as may best serve to save and restrain the water now running to waste from said Spring Pond, the better to save and supply fresh water from said Spring Pond for aqueduct purposes."

Section 2 of the act provides that any person or corporation whose land is taken or injured by the Jamaica Pond Aqueduct Corporation under the act, may apply for a jury to assess the damages for such taking or injury, by petition to the Superior Court for Norfolk County, and that, after the petition is duly entered in court, "the cause shall thereupon proceed like other civil causes in said court." The pond called Spring Pond in the act is now known as Ward's Pond. The act of incorporation, to which this statute is additional, provides that the damages for land taken "may be estimated by the county commissioners of the county of Norfolk, saving to either party the right of trial by jury, according to the law which provides for the recovery of damages accruing by laying out public highways." St. 1857, *c.* 135, § 3. Though the St. of 1868 contains no express direction to that effect, it is clear, by reasonable implication, that the intention of the Legislature was that the same rules should govern as are applied in the assessment of damages in cases of laying out highways.

The bill of exceptions does not state fully the title proved by the petitioners, but enough appears to show that they were at the time of the taking, and had been for many years, in possession of all the land taken and injured, claiming to be the owners in fee. Among other deeds, a deed from "The Aqueduct Corporation" to John Ward, dated July 12, 1804, was put in evidence. The material parts of this deed are set forth in *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159, 160, and its construction is there considered. For convenience in this discussion, we will designate it as the Ward deed. The respondent offered to show that this Ward deed covered a part of the petitioners' land which was taken and injured.

The respondent did not contend that it had the right to show any title in itself derived from the old aqueduct corporation, under the deed given when that corporation was disseised. It admits that it is concluded, upon this point, by the former adju-

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dication. *Jamaica Pond Aqueduct* v. *Chandler*, 121 Mass. 1. But it contended that by the Ward deed, which was a part of the petitioners' claim of title, the petitioners took only a base fee, and that the respondent had the right to rely upon this fact in reduction of damages.

It is not necessary to decide whether the Ward deed conveyed a fee simple or a base fee. In *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 167, the court held that it passed more than a chattel interest. The counsel for the tenants in that case contended only that it passed a base fee, and the court so regarded it; but the question whether the habendum was not repugnant to the grant, so that it passed a fee simple, was not raised or considered. If we assume, for the purposes of this case, that it passed only a base fee, we are of opinion that the respondent could not avail itself of this fact in diminution of the petitioners' damages. A base or qualified fee is an estate which may continue in one and his heirs forever, but which has a qualification annexed to it, by virtue of which it may be determined when that qualification is at an end. Cruise Dig. tit. 1, § 68. The grantee under the Ward deed took at least a base fee determinable by the removal by the grantor of the pipes from his land. Until it is determined, he has a fee, with generally all the incidents of an estate in fee simple. Cruise Dig. tit. 1, § 71. The grantor has no subsisting title in the land, but only a possibility that it may revert to him by the happening of the event upon which it is determinable. He is not, within the meaning of the act under which these proceedings are instituted, a person or corporation whose land is taken by the respondent. His possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury.

The petitioners, having shown a possessory title, may maintain this petition. *Hawkins* v. *County Commissioners*, 2 Allen, 254. And we are of opinion that, as owners of the fee, they have the right to recover the value of the land, even if a part of it is held by them under the Ward deed, and they have only a base fee in it.

It follows from these considerations that the Superior Court rightly rejected the evidence to show that a part of the land taken and injured was included in the Ward deed, and properly

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refused the respondent's third and fourth requests for instructions.

The next exception we will consider grew out of the claim of the respondent that, by the deed of the old aqueduct corporation to the city of Boston, dated in 1851, and by subsequent mesne conveyances, it took the easements reserved to the grantor in the Ward deed, and that the jury should consider the existence of these easements in reduction of damages. The court in form rejected this claim, assigning as one reason that the easements appeared to be appurtenant to the mill site. We are not able to see that the reason given by the court was correct, but this was an immaterial error, because, upon a careful examination of the whole case, it is apparent that it was not prejudicial to the respondent. The first reservation is of "the right to any logs or pipes in the same leased premises for the purpose of conveying water from Jamaica Pond, or any of the streams, fountains and springs issuing from or near the same, through all and every part of the premises." This reservation would affect only the line of pipes which was in the ground at the date of the deed, in 1804. It would not affect the line of iron pipes laid afterwards, and which runs through the petitioners' land adjoining that taken, and which they claim is injured by the taking. The bill of exceptions does not show that the first named line of pipes runs across the land taken. If it did not, this reservation did not create any easement upon the land taken or the adjoining land, which is the subject of inquiry in this case. But another and satisfactory answer to the respondent's exception on this point is, that the jury allowed it in diminution of damages for the incumbrance of the pipes as they existed at the time of the taking in 1870. The undisputed evidence in the case showed that the respondent had maintained both lines of pipe, under a claim of right, for more than twenty years. It was therefore treated at the trial as having acquired a right by prescription to maintain them, and the jury were instructed to "deduct from the sum which they consider the fair value of the land, as unincumbered, such sum as they think this incumbrance of the pipes diminished the land in value." The respondent thus received the benefit of this easement of the pipes, and it is quite immaterial whether it existed in it by prescription or by a reservation in the Ward deed.

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The only other reservation in the Ward deed which affects the premises in question is the right "of raising any dam above or on the westerly boundary of the leased premises, to raise, stay or conduct the water for the use aforesaid, and to dispose of, check, impede or use any water tending to or issuing through the same leased premises, at its pleasure." The respondent contended that it had a right, under this reservation, to raise a dam and flow the land of the petitioners included in the Ward deed. It is a sufficient answer to this claim to say, that the uncontroverted evidence in the case shows that this easement was extinguished. At the trial in 1862, before Mr. Justice Metcalf, whose report was by agreement admitted as evidence in this case, it was found as a fact that prior to 1851, for many years, the aqueduct corporation made no use of the land described in the Ward deed and made no claim to any right therein, except such use and claim as would enable it to preserve its aqueduct in repair through these lands, and that the corporation was disseised of this land in 1851. The respondent does not contend that it or its grantors have ever in fact made any use or asserted any right to this easement. Its claim is that it is not shown that it has voluntarily abandoned the easement. But since 1851, at least, the petitioners and their grantors have held this land under a claim of title adverse to the aqueduct corporation and its assigns. It is true, as argued by the respondent, that the mere non-user of an easement, even for more than twenty years, will not be conclusive evidence of an abandonment. But a non-user for twenty years, united with an adverse use of the servient estate, inconsistent with the existence of the easement, will extinguish it. *Barnes* v. *Lloyd*, 112 Mass. 224. *Owen* v. *Field*, 102 Mass. 90. *Jennison* v. *Walker*, 11 Gray, 423. The easement we are considering was the right to raise a dam and to check, impede and use the water running through the land, and thus to flow it. This is a surface easement, and we are of opinion that the uninterrupted adverse use and occupation by the petitioners, for more than twenty years, of the land in question, under a claim of a title in fee, extinguished the easement. Such use and occupation was adverse to and inconsistent with the use of the easement, and gave to the petitioners a title by prescription to the land free of the easement.

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We are therefore of opinion that the respondent was not aggrieved by the refusal of the court to rule that the jury were to deduct anything from the value of the land on account of these easements.

The respondent contended that under the deed of Giles Alexander and others to Luther Eames, dated March 15, 1794, it had the right to open any part of the land described therein for the purpose of laying pipes through it in any place and in any number, and to change the location of the pipes at its pleasure, and requested the court so to rule. The court rightly refused this ruling. This deed grants to Eames "a right to open our several lands when it may be found necessary for the purpose of laying such pipes, and liberty to keep and support such pipes therein forever." It grants the right to lay a line of pipes in such place as may be found necessary, but it does not expressly or by implication grant a right to change the location of the pipes after they are once laid. The case cannot be distinguished from *Jennison* v. *Walker*, 11 Gray, 423. See also *Bannon* v. *Angier*, 2 Allen, 128; *Jones* v. *Percival*, 5 Pick. 485.

The respondent, in its fifth prayer for instructions, asked the court to rule that the petitioners had, in 1870, no right to change the location of the watercourse, nor to cover it over. The instruction given in reply seems to be a substantially correct proposition of law; but the bill of exceptions does not show that the instruction requested was called for or pertinent, and therefore fails to show that the respondent was injured by the instruction given, if it was erroneous.

The respondent requested the court to rule that the petitioners were entitled to recover interest only from the date of the filing of the petition, and not from the date of the taking. This request was rightly refused. *Old Colony Railroad* v. *Miller*, *ante*, 1.

The respondent also requested the court to rule that, under the language of the petition, the petitioners were not entitled to damages for injury to their adjoining land. The petition describes the land taken, and prays for a jury to assess the damages caused by such taking. This request was also rightly refused, and the jury properly instructed that they might return damages for injury to the adjoining land of the petitioners. By

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the statute, the jury are to assess the damages sustained by any person whose land is taken or injured. As we have before said, they are to proceed according to the law regulating the assessment of damages for land taken for a public way, and must assess not only the value of the land taken, but any injury resulting to the adjoining land of the petitioners.

Several exceptions which were taken by the respondent to the admission of evidence upon the trial, remain to be considered.

1. Ernest W. Bowditch, called by the petitioners, testified that he was a civil engineer and landscape gardener by profession, and had had experience in his profession throughout the eastern part of the United States; that he was familiar with the land taken, and had specially examined it and the other land of the petitioners. He was then asked, against the respondent's objection, what the land in question was suitable for, in his opinion as a landscape gardener. The court admitted the evidence. This testimony was properly admitted. The jury were to determine what was the fair market value of the petitioners' land taken by the respondent. In determining this, they ought to consider its capabilities and the purposes for which it may be used. The testimony of Bowditch tended to show the character of the land and the purposes to which it was adapted, and was competent.

2. Three witnesses, called by the petitioners, were allowed to testify, against the respondent's objection, to the value of the land taken. Two of them had been selectmen of Brookline for many years, and one of them had bought and sold land there. The other was an assessor of Brookline from 1871 to 1877, had lived in the town for twenty years, and had been on the land in question, and had specially examined it. When witnesses are called to testify to the value of land, the question whether they are sufficiently acquainted with the value of land in the vicinity to qualify them to testify is largely a matter of discretion in the presiding justice. If they have become acquainted with the value of land in the vicinity, because they have been public officers, such as county commissioners, or selectmen or assessors, or because they have known of sales of land by themselves or others, they are generally admitted to testify as to value, not strictly as experts, but because they possess more knowledge upon the subject than the jury or the public generally. *Swan* v. *Middle-*

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sex, 101 Mass. 178. In this case, we can see no error in admitting the testimony of these witnesses, all of whom had been town officers of Brookline, and as such were acquainted with the value of land in the immediate vicinity of the land in question. The fact that this land was on the other side of the town line, in West Roxbury, would not disqualify them as witnesses.

3. The question put to the witness Kendrick, whether he had not frequently been called as a witness to the value of land in land-damage cases, was not incompetent. The court were inquiring whether he was qualified to give his opinion as to the value of the land in controversy. There was other testimony tending to show that he was so qualified. The fact that he had often been a witness in similar cases, was a circumstance tending to show what attention he had given to the subject of the value of land, and was admissible within the discretion of the presiding justice.

4. The only remaining exceptions are those alleged to the testimony of the witness Philbrick. The witness testified that he was a civil engineer, that he was familiar with the value of land in the vicinity, and that he had, within the last two years, professionally made several examinations of dams and waterworks; and that, if a dam, high enough to enlarge Ward's Pond to the limit taken by the defendant corporation, were built by the respondent, it would injure the remaining land of the petitioners materially; would make it less desirable for dwelling-houses, and would injure its sale. We are of opinion that this testimony was competent. By the act under which the petitioners' land was taken, the respondent had the right to build such a dam as is described in the testimony of the witness, and the jury ought to take into consideration the fact that, in order to carry out the purposes of the act, such a dam might be built. It is not within common knowledge and experience what would be the effect of such a dam upon lower land in its immediate vicinity, like that of the petitioners. But a civil engineer, who has studied the subject, might be able to tell whether the water would percolate or leak through the dam, so as to render the adjoining lower land moist and undesirable for dwelling-houses. It was a matter upon which the testimony of experts is admissible to aid the judgment of the jury, and the witness was shown to be

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an expert. The respondent relies upon the case of *Boston & Worcester Railroad* v. *Old Colony & Fall River Railroad*, 3 Allen, 142; but the cases are distinguishable. In that case, it was held that a witness, Howe, was not qualified to give his opinion as to the effect of the location of the defendant's railroad over the land adjoining a wharf used for the wood and lumber business, whose qualification as a witness consisted in having been engaged in the lumber business for a number of years and having been president of a railroad for several years. The court put his exclusion upon the ground that, though he had been in the lumber business and connected with railroads, yet it was not shown that he had ever known of the use or occupation of a wharf by a railroad running over it, and therefore that he had no practical experience or peculiar means of knowledge on the subject in regard to which his opinion was asked. If the only evidence of the qualification of the witness Philbrick as an expert in this case had been that he was a civil engineer, the case might be similar to that of the witness Howe. But Philbrick testified that he had professionally made examinations of many dams and waterworks. Such examinations might give him special knowledge upon the subject, and his testimony justified the Superior Court in permitting him to give his opinion as an expert.

Upon the whole case, we are of opinion that the respondent has shown no sufficient reason for disturbing the verdict of the jury. *Exceptions overruled.*

MILTON JUDD *vs.* MARTIN V. THOMPSON & others.

Berkshire. Sept. 10. — Nov. 23, 1878. AMES & SOULE, JJ., absent.

If the record of a town meeting fails to show that a vote, under the St. of 1870, c. 196, § 1, to reëstablish the school-district system therein, was a two-thirds vote, the vote is invalid; and the defect is not cured by the following amendment of the record made by the clerk: "I hereby amend the preceding record, from the best of my recollection that the vote to reëstablish the school-district system was passed by two thirds the legal voters present and voting thereon. The two-thirds vote was not so declared by the moderator, nor were the votes on either side counted; but, from my knowledge and recollection, I have no doubt but that the above is according to the truth."

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Assessors are liable, in an action of tort, for assessing and issuing a warrant for the collection of a school-district tax, if the school district was not legally established, although it was certified to them, by one acting as clerk of the district, that the tax had been voted by the district.

TORT against the assessors of Monterey, for illegally assessing and causing to be collected a school-district tax. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts in substance as follows:

Before and at the time of the passage of the St. of 1869, *c.* 110, abolishing the school-district system, the town of Monterey was divided into nine school districts. In the warrant for the annual town meeting in March, 1871, was the following article: "To see if the town will vote to reëstablish the school districts;" and under this article it was "Voted, to reëstablish the school-district system." On November 2, 1877, the clerk of the town, who was also clerk of the town at the time of the above mentioned meeting, amended his record of that meeting as follows: "Nov. 2, 1877. I hereby amend the preceding record of the March meeting, 1871, from the best of my recollection, that the vote to reëstablish the school-district system was passed by two thirds the legal voters present and voting thereon. The vote was not so declared by the moderator, nor were the votes on either side counted; but, from my knowledge and recollection, I have no doubt but that the above is according to the truth."

On July 10, 1875, the inhabitants of what was school district No. 2, in Monterey, prior to the abolition of the school-district system, voted to raise by taxation the sum of $600, for the purpose of paying the debt of the district, contracted between 1871 and 1875. This vote was duly certified by the person who acted as clerk of the district to the defendants, who thereupon proceeded to assess a tax upon the inhabitants of the district to raise the stated amount; and on August 13, 1875, issued their warrant in the usual form to the collector of Monterey, who, under this warrant, collected of the plaintiff the sum assessed to him, being $11.37; and the plaintiff paid the same under protest in writing.

M. Wilcox, for the plaintiff.

H. C. Joyner, for the defendants.

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MORTON, J. Under the St. of 1870, *c.* 196, the town of Monterey could not reëstablish school districts except "by a vote of two thirds of the legal voters, present and voting thereon," at a meeting legally called for that purpose.

In *Andrews* v. *Boylston*, 110 Mass. 214, it was held that a vote of the defendant town "to reëstablish the school-district system" was defective and insufficient, because the record failed to show that the vote was adopted by two thirds of the legal voters present and voting thereon, and that this fact could not be proved by parol evidence. It is clear, therefore, in the case at bar, that the record of the annual meeting held in March, 1871, as originally made, fails to show a legal reëstablishment of the school districts in the town of Monterey.

In November, 1877, the clerk of the town, who was also clerk at the annual meeting in March, 1871, amended his record, the amendment being as follows: "November 2, 1877. I hereby amend the preceding record of the March meeting, 1871, from the best of my recollection, that the vote to reëstablish the school-district system was passed by two thirds the legal voters present and voting thereon. The vote was not so declared by the moderator, nor were the votes on either side counted, but from my knowledge and recollection, I have no doubt but that the above is according to the truth."

The question is, whether this amendment cures the deficiency in the record, so that, as amended, it shows a legal reëstablishment of the school districts. We are of opinion that it does not. There is no doubt that the clerk, he having continued to be clerk to the time when he made the amendment, had the right to amend his record by adding any votes or other transactions of the meeting, accidentally omitted, and which were properly matters of record. *Halleck* v. *Boylston*, 117 Mass. 469, and cases cited. This is upon the ground that he is a sworn officer, has custody of the records, is presumed to know the facts, and, if he states what is not true, he may be punished for fraudulent conduct in his office. But he cannot, by inserting in his records any statements of facts or opinions which are not properly matters of record, make such statements evidence for or against the town.

It is the duty of the moderator to preside in the meeting and to "make public declaration of all votes passed," so that the

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vote, if questioned by seven or more voters, may be made certain by polling the voters or dividing the meeting. Gen. Sts. *c.* 18, § 27. It is the duty of the clerk to record all votes and transactions of the meeting. He should record the votes as declared by the moderator. He cannot properly insert in the record any different declaration founded upon his private count or judgment of the number of voters upon each side. In a case like this, it was the duty of the moderator to declare, if such was the fact, that the vote was passed by a vote of two thirds of the legal voters present and voting, or to declare the numbers voting on each side, so that it would appear that it was passed by a vote of two thirds; and, as stated in *Andrews* v. *Boylston*, *ubi supra*, "the essential fact should be ascertained at the time, and not made the subject of investigation at a subsequent time."

In the case at bar, the record, as amended, does not show that a legal vote reëstablishing the school districts was passed. It shows that the votes were not counted on either side, and that it was not declared by the moderator to be a two-thirds vote. The clerk, in his amendment, does not take the responsibility of recording as a fact that the vote was passed by a vote of two thirds of the voters present and voting; if he had done so, the fact could not be contradicted by parol testimony, but he might be liable for fraudulent conduct in his office. The amendment, fairly construed, merely amounts to a certificate that, according to his recollection and judgment, the vote was passed by two thirds of the voters present and voting, although the vote was not counted and was not so declared by the moderator. This is not properly a part of the record, and is not competent evidence to show that the vote reëstablishing the school districts was legally passed.

It follows from these considerations that the plaintiff is entitled to maintain his action. In *Dickinson* v. *Billings*, 4 Gray, 42, it was held that assessors are liable for assessing and issuing a warrant for the collection of a school-district tax, if the school district was not legally established, although it was certified to them by one acting as clerk of the school district that the tax had been voted by the district. This is conclusive of the case at bar. *Judgment for the plaintiff.*

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LUCY CROSS *vs.* COUNTY OF PLYMOUTH.

Plymouth. Oct. 15. — Nov. 23, 1878. AMES, ENDICOTT & SOULE, JJ., absent.

Upon a trial to assess damages for land taken to widen a street, the jury were instructed that "the benefit to be deducted must be a benefit which is direct and special to the estate of the petitioner, and not a general benefit shared by his estate in common with other estates in the vicinity, and in common with other estates abutting upon the same street, no part of which has been taken for the widening, and this benefit may be direct and special, although other estates upon the same street, similarly situated, were similarly benefited." *Held*, that this instruction was not erroneous.

Upon a trial to assess damages for land taken to widen a street, it is within the discretion of the presiding officer, who has given general instructions upon the subject, to refuse to give a special instruction to the jury upon a particular item of alleged benefit to the petitioner's estate.

PETITION to the county commissioners for a jury to assess damages occasioned by the taking of a strip of the petitioner's land, eight feet and a half in depth, for the widening of Main Street in Brockton.

At the trial before a sheriff's jury, there was evidence that the petitioner's land, which was situated in the business part of the town, was, before the widening, two hundred and forty-one feet deep, and was, to the depth of eighty or one hundred feet from the street, worth from two to three dollars a foot, while the rear portion was of much less value.

The respondent requested certain instructions to be given to the jury, which were not given in terms; but other instructions were given. The jury returned a verdict for the petitioner. In the Superior Court, the verdict was accepted; and the respondent appealed to this court. The requests for instructions and those given appear in the opinion.

J. White, for the respondent.

J. G. Abbott, for the petitioner.

MORTON, J. The respondent makes two objections to the rulings of the officer who presided at the trial before the sheriff's jury. The first is to the ruling as to the benefits to the petitioner's estate, which should be deducted, in determining the amount of her damages.

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The respondent requested that the following instruction be given to the jury: "1. In estimating the damages arising from the widening, and the taking of the petitioner's land therefor, the jury should allow, by way of set-off, the benefit, if any, to her property by reason thereof, meaning not that general benefit from the widening received by her in common with other owners generally in that neighborhood, but the direct, especial, peculiar benefit to the petitioner's remaining land, by causing it to front on a more spacious and convenient avenue; and this benefit may be direct and special, and the set-off proper to be made, although many other estates on the same street, and similarly situated, were similarly benefited." The presiding officer did not adopt the language of this request, but ruled that "the benefit to be deducted must be a benefit which is direct and special to the estate of the petitioner, and not a general benefit shared by her estate in common with other estates in the vicinity, and in common with other estates abutting upon the same street, no part of which has been taken for the widening, and this benefit may be direct and special, although other estates upon the same street similarly situated were similarly benefited." The respondent contends that this is a ruling to the effect that the jury should not set off any benefit shared by the petitioner's estate in common with other estates abutting upon the same street, no part of which had been taken for the widening. But such is not its fair construction. The instruction, in the clause objected to, was dealing with the "general" benefits, which are not the subject of set-off. It is true, as therein stated, that general benefits, shared by the petitioner's estate in common with other estates in the vicinity, and also in common with other estates on the same street, no part of which has been taken for the widening, cannot be set off. If they are general benefits, they are not to be set off, although they are shared in common with other estates upon the same street. If they are peculiar and special benefits, they may be set off, though similar benefits accrue to other estates on the same street. *Hilbourne* v. *Suffolk*, 120 Mass. 393. *Parks* v. *Hampden*, 120 Mass. 395. That this was the meaning of the instruction is made plain by its last clause, in which it is expressly stated that the "benefit may be direct and special, although other estates upon the same street, similarly situated, were similarly benefited."

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The instruction, therefore, was substantially in accordance with the first instruction requested by the respondent, and affords no ground of complaint. If, as is now contended, there was any danger that the jury might misconstrue it, the attention of the presiding officer should have been called to it at the trial, when any proper explanations could have been given. We must assume that the jury understood it according to its proper construction.

The second objection of the respondent is to the refusal of the presiding officer to give the fourth instruction requested. This request was as follows: "If, by the taking of a portion of the front part of the petitioner's land for the purpose of widening the street, a like portion of the rear part of the same is made available for use, and is enhanced in value for such use, or for sale at a higher price, such enhanced value is to be set off against any damage to which the petitioner would be entitled for the taking." The presiding officer did not give this instruction in these words; but instructed the jury that it was their duty to apply the rules of law, as given them, to all the facts before them; and, without specifying to the jury the particular benefits claimed by the respondent, directed them that, if they found that any benefits had accrued to the petitioner's land, they should deduct the amount from the damages. The respondent could not, as matter of right, require the presiding officer to select one particular item of benefit which it was contended had accrued to the petitioner's estate, and to give special instructions in regard to it. Such a course might tend to give undue prominence to this claim of the respondent. We are of opinion that it was within the discretion of the presiding officer to refuse this request, and therefore that his refusal furnishes no ground for setting aside the verdict. *Verdict accepted.*

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JAMES TERRY *vs.* SARAH F. SISSON & trustee.

Bristol. Oct. 24. — Nov. 7, 1878. ENDICOTT & LORD, JJ., absent.

A writ was made out against S. S., and a savings bank summoned as trustee. The writ was in fact served on S. F. S., and was afterwards amended accordingly. After service of the writ on the bank, and before the amendment, the bank paid to S. F. S. funds in its possession, deposited by him. No notice to, or knowledge by, the bank, that S. F. S. was the person intended to be sued, was shown. *Held*, that the bank was not chargeable as trustee.

TRUSTEE PROCESS. The writ was dated November 29, 1876, and, as originally sued out, returnable to the Second District Court of Bristol on the second Monday of December, 1876, was against Sarah Sisson as defendant, and the Fall River Savings Bank as trustee. The officer's return showed that service thereof was made on the trustee on December 1, and on the defendant on December 5, 1876.

On January 19, 1877, upon the affidavit of the officer that the service last mentioned was made on Sarah F. Sisson, the District Court allowed the plaintiff to amend his writ, by making the defendant's name Sarah F. Sisson.

The trustee afterwards filed an answer, stating that, at the time of the service upon it, there was not any person of the name of Sarah Sisson, who was a depositor in the bank, or to whom the bank was indebted. The trustee, in answer to interrogatories filed by the plaintiff, further answered that it appeared by the books of the bank that on December 1, 1876, a person by the name of Sarah F. Sisson was a depositor in the bank, having a credit of $53.19, and that that account was withdrawn by her from the bank on December 5, and that the bank had not at any time taken from her, or from any other person, any bond of indemnity or promise of repayment, in case the bank should be held liable in this or any other action.

The District Court gave judgment for the plaintiff against the defendant, and discharged the trustee; the plaintiff appealed to the Superior Court, which affirmed the judgment; and the plaintiff then appealed to this court.

J. F. Jackson, for the plaintiff. The amendment in this action, changing the name of the defendant from Sarah Sisson to

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Sarah F. Sisson, was an amendment of form merely, and did not affect the attachment of the funds in the hands of the trustee, since it introduced no new party or cause of action. *Wight* v. *Hale*, 2 Cush. 486. The amendment in this action is at least binding upon all the parties thereto; the trustee is one of the parties. No subsequent attaching creditor or other person has acquired any title or right to the funds in the hands of the trustee since the attachment was made. A trustee cannot affect the question of his being charged or discharged, by paying over the funds in his hands, without awaiting the final action of the court. *Vermilyea* v. *Roberts*, 103 Mass. 410. *West* v. *Platt*, 116 Mass. 308. *Langmaid* v. *Puffer*, 7 Gray, 378.

E. Williams, for the trustee.

GRAY, C. J. It is well settled in this Commonwealth that the middle name or initial is an essential part of the name. Sarah Sisson and Sarah F. Sisson are therefore different names. *Commonwealth* v. *Hall*, 3 Pick. 262. *Commonwealth* v. *Shearman*, 11 Cush. 546. *Commonwealth* v. *McAvoy*, 16 Gray, 235. The misnomer could not indeed be taken advantage of by the principal defendant, who had been duly served and had suffered a default; and it might, as between her and the plaintiff, be amended, at the discretion of the court. *Trull* v. *Howland*, 10 Cush. 109. *Crafts* v. *Sikes*, 4 Gray, 194. *Langmaid* v. *Puffer*, 7 Gray, 378. But such an amendment cannot affect intervening rights of third persons. The only writ served upon the trustee was against Sarah Sisson. The trustee, having no funds belonging to any person of that name, and acting, so far as appears, in good faith and with no notice or knowledge that the person intended to be sued was Sarah F. Sisson, lawfully paid over to the latter the funds in its hands belonging to her, and cannot by the subsequent amendment of the writ be made liable to pay the same over again to the plaintiff.

The cases, on which the counsel for the plaintiff relies, contain no adjudication inconsistent with this conclusion, although expressions in some of the opinions might, apart from the facts to which they applied, seem to countenance his position. In *Langmaid* v. *Puffer*, above cited, the question arose between the plaintiff and defendant. In *Wight* v. *Hale*, 2 Cush. 486, and in *West* v. *Platt*, 116 Mass. 308, the writ was sued out by or

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against two partners, described and clearly identified by the true names of the partnership and of one partner, although there was a clerical error or omission in the name of the other partner. In *Vermilyea* v. *Roberts*, 103 Mass. 410, the trustee's answers admitted that he still held the funds after the amendment of the writ, so that he was *primâ facie* chargeable; and the mere fact that he had, before the amendment, received a copy of an assignment of the funds, without further proof of its existence or validity, did not show, as matter of law, that the court below erred in charging him. *Richards* v. *Smith*, 9 Gray, 315. *Lane* v. *Felt*, 7 Gray, 491. *Judgment affirmed.*

ALONZO J. MARVIN *vs.* EDWARD D. MANDELL.

Bristol. Oct. 22. — Nov. 11, 1878. ENDICOTT & LORD, JJ., absent.

In an action for money had and received, the defendant, under a general denial, may prove that money, admitted to have been received by him, was, by agreement of parties, applied to the payment of advances previously made by him to the plaintiff.

Under the St. of 1867, c. 56, § 2, making it lawful to contract to pay a greater rate of interest than six per cent. per annum, and providing that no greater rate "shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing," a person who has paid a greater rate than six per cent. per annum, under an oral agreement, cannot maintain an action to recover back the excess.

MORTON, J. This is an action of contract for money had and received. The answer is a general denial. At the trial, the evidence tended to show the following facts:

The plaintiff was master of the whaling ship Adeline, and the firm of Charles R. Tucker & Co., of which the defendant is the surviving partner, were the agents of the ship. Before the ship sailed, in 1869, the plaintiff bought one sixteenth part of her, and the defendant advanced to the plaintiff a portion of the purchase money. Mr. Tucker, one of the firm, told the plaintiff that they should be obliged to charge him seven per cent. interest, as they had to borrow the money, and it would cost them as much as that at least. The plaintiff said he would do what was right, and was willing to pay them whatever it cost them for the money, but no agreement in writing was made between the par-

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ties. After the return of the ship in 1874, the defendant's firm made up their account with the plaintiff, charging him seven per cent. interest compounded, on the advances made by them. The computation of the interest was explained to the plaintiff, and he made no objection to it. The account was settled between the parties in December, 1874, the plaintiff giving his receipt in full. The defendant testified that the amount charged for interest was what it cost the firm to obtain the money advanced to the plaintiff.

Upon this evidence, it was competent for the jury to find that the agreement between the parties in 1869 was that the defendant's firm, upon receiving the proceeds of the plaintiff's share or interest in the voyage, might apply them in the first instance to the repayment of the advances made by them to him, with such interest as was agreed upon.

If this was the agreement, it follows that the money received by the defendant's firm, to the amount necessary to repay their advances and interest, was not received to the use of the plaintiff, but to their own use, and this defence is open to the defendant under a general denial.

The rule of pleading is, that any matter in discharge or avoidance of a debt once existing must be specially pleaded, but any matter which shows that the debt never existed may be given in evidence under a general denial. It was competent, therefore, for the defendant in this case to prove, under his general denial, that the amount claimed by the plaintiff was, according to the agreement of the parties, received and applied by the firm to the advances made by them and interest. Such evidence would sustain his denial, and show that no indebtedness to the plaintiff ever existed on account of the money so received and applied. *Howard* v. *Hayward*, 16 Gray, 354. *Hawks* v. *Hawks*, 124 Mass. 457.

It should be observed, to prevent misunderstanding, that the plaintiff only claims in this suit the sum of $145, being the excess of the interest over six per cent. retained by the firm. If he had claimed the whole amount received by the firm as the proceeds of his share, the defendant, in order to avail himself of any payments to the plaintiff made since the receipt, must have specified them in his answer.

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Another question involved in the case, though not strongly pressed by the plaintiff, is whether the plaintiff was entitled to a verdict because the defendant's firm retained a greater rate of interest than six per cent. The St. of 1867, *c.* 56, § 2, provides that it shall be lawful "to contract for payment and receipt of any rate of interest; provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing." The third section repeals §§ 3–5 of the Gen. Sts. *c.* 53. Under this statute, so long as an oral agreement to pay a greater rate of interest than six per cent. remains executory, it cannot be enforced. But it is lawful for parties to pay and to receive a greater rate; and if a greater rate is voluntarily paid, the excess over six per cent. cannot be recovered back.

In the case at bar, if the jury find that the parties in 1869 made the agreement as claimed by the defendant, and that the defendant's firm, upon receiving the plaintiff's money, in good faith and according to the terms of the agreement, applied it to paying their advances and interest, or if they find that in 1874 the plaintiff, no fraud or deception being practised upon him, voluntarily settled the account of the defendant, he cannot maintain his action.

For these reasons, we are of opinion that the learned judge who presided in the Superior Court erred in directing a verdict for the full amount claimed by the plaintiff, and that the case should be submitted to the jury with proper instructions.

New trial ordered.

G. F. Tucker, for the defendant.

H. M. Knowlton, for the plaintiff.

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WILLIAM CARROLL & another *vs.* ST. JOHN'S CATHOLIC TOTAL ABSTINENCE AND MUTUAL RELIEF SOCIETY.

Bristol. Oct. 24.— Nov. 11, 1878. ENDICOTT & LORD, JJ., absent.

A lease, purporting to be between A. as lessor and a corporation as lessee, was executed by A. and by B. and C., with no words to indicate in whose behalf the two latter signed it or in what capacity. B. and C. were the majority of a committee appointed by the corporation to make a lease, which made a report that it had made this lease for the corporation. The corporation accepted the report, entered under the lease and occupied the premises. *Held*, that the corporation was liable for the rent reserved in the lease, and could not terminate its estate by a notice sufficient to determine a tenancy at will.

A corporation, occupying a hall under a lease, appointed a committee to wait on A., the lessor, and "to ask for a reduction of the rent of the hall." The committee reported orally that A. said that he could not reduce the rent, but if the corporation would pay a certain sum until a certain date, then the lease should terminate. The corporation voted "that the report of the committee which waited upon A. for a reduction of the rent of this hall be accepted." *Held*, that this vote was not an acceptance of A.'s proposition.

CONTRACT for rent of a hall for October and November, 1876, and for a gas bill, under a written lease signed by the plaintiffs and by Thomas McCarty and Edward Higney. Trial in the Superior Court, before *Dewey*, J., who, after a verdict for the plaintiffs, allowed a bill of exceptions, so much of which as is material appears in the opinion.

J. M. Morton, Jr., for the defendant.

T. M. Stetson & H. K. Braley, for the plaintiffs.

MORTON, J. The lease in question purports to be a lease from the plaintiffs to the defendant for five years from October 1, 1874, at a rent of twelve hundred dollars a year, payable monthly. It is duly executed by the plaintiffs. It was not executed on behalf of the defendant in its own name, but was executed in their private names, by a majority of a committee appointed by the defendant to make the lease. The defendant asked the court to rule that, owing to this defective execution of the lease, it was not bound by it, but was to be regarded as a tenant at will with power to terminate its tenancy by due notice. The court rightly refused this ruling. It appeared at the trial that a committee had been appointed with instructions to lease the hall for five years, that it reported that it had made

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this lease for the defendant, that the report was accepted, and thereupon the defendant society entered under the lease and occupied the leased premises for two years. The plaintiffs, having duly executed the lease, were bound by its stipulations. For it is an ancient doctrine of the law that if one party executes his part of an indenture it shall be his deed, though the other party does not execute his part. Com. Dig. Fait. C. 2. *Codman* v. *Hall*, 9 Allen, 335. And it is equally clear that the defendant, having accepted the lease and entered and occupied under it, is bound by its provisions, and liable to pay the rent therein reserved, to the same extent, at least, as if it were a deed poll executed by the plaintiffs. The estate vested in the defendant, and could not be terminated by the notice sufficient to determine a tenancy at will. *Kabley* v. *Worcester Gas Light Co.* 102 Mass. 392. *Lamson & Goodnow Manuf. Co.* v. *Russell*, 112 Mass. 387. *Clark* v. *Gordon*, 121 Mass. 330.

Another exception remains to be considered. It appears by the bill of exceptions that in February, 1876, the defendant society appointed a committee to wait on the plaintiffs and "to ask for a reduction of the rent of the hall." This committee subsequently reported orally that the plaintiffs said they could not reduce the rent of the hall, but if the society would pay $100 a month till October 1, 1876, then the lease should terminate. Thereupon the society voted "that the report of the committee who waited upon Messrs. Carroll and Butler for a reduction of the rent of this hall be accepted." We are of opinion that the court rightly ruled that the mere acceptance of the report of the committee was not an acceptance of the plaintiffs' proposition. It will be observed that the report of the committee did not state that they had made any contract with the plaintiffs, and did not propose any action by the society. If it had, perhaps the acceptance of the report might have amounted to a ratification of the contract or an adoption and approval of the action proposed. *Niles* v. *Patch*, 13 Gray, 254. *Arlington* v. *Peirce*, 122 Mass. 270. But the report merely stated that the plaintiffs had made a conditional proposition to terminate the lease on October 1, 1876. It did not state that the committee had accepted this proposition, nor propose any action of the society accepting it. The acceptance of this report might dis-

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charge the committee, but it would not, of itself, without any further action accepting the plaintiffs' proposition and notifying them of the acceptance, bind the society or create a contract binding upon the plaintiffs. *Exceptions overruled.*

CITY OF FALL RIVER *vs.* COUNTY COMMISSIONERS OF BRISTOL.

Bristol. Oct. 25. — Nov. 11, 1878. ENDICOTT & LORD, JJ., absent.

The St. of 1872, *c.* 306, relating to the taxation of reservoirs, is unconstitutional, and a tax assessed under it is invalid.

If a reservoir company owns merely a right to flow land, this is not an estate liable to taxation.

A corporation, having a capital stock divided into shares, is not taxable for cash in its treasury.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners of Bristol in abating a tax assessed by the petitioner in 1876 upon the Watuppa Reservoir Company. Hearing upon the petition and answer, before *Ames*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

M. Reed, for the petitioner.

J. M. Morton, Jr., for the respondents.

MORTON, J. It appears from the return of the county commissioners that the tax in question was assessed upon a reservoir company, under the St. of 1872, *c.* 306, in the terms following: "Reservoir of water used to maintain a uniform supply of water for mill purposes, with the dam connected therewith, and the land under the same," and that this was the only tax assessed by the city of Fall River upon said reservoir company during the year 1876. In *Cheshire* v. *County Commissioners*, 118 Mass. 386, it was held that this statute was unconstitutional and void. It necessarily follows that the tax in question was illegal.

The claim of the petitioner, that this tax may be upheld because the reservoir company was taxable for a part of its property, cannot be sustained. One sufficient answer is, that it had no property which was liable to taxation. It did not own the dam, nor any of the land covered by the pond. The dam was

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built at the outlet of the Watuppa ponds, which were great ponds, on the land of the Troy Cotton and Woollen Manufactory; and the only interest in any land which the reservoir company had was the right to flow the lands surrounding the ponds to a point two feet above the old dam. This is merely an easement in the land, which cannot be taxed independently. It forms part of the water-power which is taxed in connection with the mills, as enhancing their value.

The reservoir company, being a corporation having a capital stock divided into shares, was not liable to be taxed for the cash in its treasury, that being personal property which enters into the value of the shares. *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181.

For these reasons, without discussing others, we are of opinion that the decision of the commissioners abating the tax was correct. *Petition dismissed.*

ELLEN SULLIVAN *vs.* CITY OF FALL RIVER.

Bristol. October 22. — November 18, 1878.

An action for an injury occasioned to the plaintiff by a defect in a highway, before the St. of 1877, *c.* 234, repealing the Gen. Sts. *c.* 44, §§ 1, 22, took effect, and brought in the Superior Court after the passage of that statute, may be removed by affidavit of the defendant to this court, under the Gen. Sts. *c.* 114, § 8.

TORT for personal injuries occasioned to the plaintiff on March 15, 1877, by reason of an alleged defect in a highway in Fall River, which the defendant was bound to keep in repair. The writ was dated August 11, 1877, and was returnable to the Superior Court at September term 1877, the *ad damnum* being $20,000. At that term it was removed to this court, on an affidavit of the defendant, under the Gen. Sts. *c.* 114, § 8.

At the trial, a question was raised as to the right of removal, and as to the jurisdiction of this court; and *Soule*, J., reserved the case for the determination of the full court. If the action was rightfully removed, the case was to stand for trial; otherwise, it was to be remitted to the Superior Court,

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G. Marston, for the plaintiff.

J. M. Morton, Jr. & M. Reed, for the defendant.

GRAY, C. J. The St. of 1877, *c.* 234, (which took effect after the injury sued for, and before this action was brought,) amends the law relating to the liability of towns and cities for damages from defects in highways, in several particulars: It limits the liability to cases in which the defect might have been remedied or the injury prevented by reasonable care and diligence on the part of the town. § 2. It requires that the town should have had reasonable notice of the defect, or might, by the exercise of proper care and diligence on its part, have had such notice. § 2. Any person injured is required to give the town notice of the injury within thirty days thereafter, or, in case of impossibility of doing so, from physical or mental incapacity, then within ten days after the incapacity is removed. §§ 3, 4. The action must be brought within two years after the injury. § 3. It must be brought in the Superior Court. § 3. The amount which may be recovered for damages is limited to four thousand dollars. § 3. The action (unless against the city of Boston, or a town in the county of Nantucket or of Dukes County) must be brought in the county in which the town is situated. § 5. And by § 6 of this statute, the Gen. Sts. *c.* 44, §§ 1, 22, (which made towns liable in damages, without limitation of amount, for all defects in highways of which they had reasonable notice, or which had existed for twenty-four hours before the injury,) are repealed; "but this repeal shall not affect any action or cause of action now pending."

Although the repeal in terms relates only to the former statutes which imposed the liability, and not to those which regulated the jurisdiction of courts, and the saving clause merely declares that "this repeal" shall not affect "any action or cause of action now pending," it is evident that the saving clause is meant to cover all causes of action existing, as well as all actions pending, when this statute took effect; and, as the remedy given by § 3 of the St. of 1877, by action in the Superior Court after thirty days' notice, is only to enforce the limited liability imposed by this statute for injuries occurring after it took effect, the remedy for past injuries must be pursued according to the previous statutes. To hold otherwise would, by cutting off all

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remedy for causes of action existing but not in suit when the statute took effect, defeat in great part the manifest intent of the saving clause. *Sawyer* v. *Northfield,* 7 Cush. 490.

By the previous statutes, civil actions in which the damages demanded exceeded in amount $4000 if brought in the county of Suffolk, or $1000 if brought in any other county, might be originally brought either in this court or in the Superior Court, and, if brought in the Superior Court, might be removed, by consent of parties before trial, or upon affidavit of the defendant at the first term, to this court. Gen. Sts. *c.* 112, § 6; *c.* 114, §§ 4, 7, 8. The object of these statutes was to allow either party to bring into this court for trial any case which was within the concurrent jurisdiction of this court and of the Superior Court, giving the plaintiff the election to do so in the first instance, but, if he did not exercise it, conferring upon the defendant an equal right. *Humphrey* v. *Berkshire Woollen Co.* 10 Allen, 420.

The legal effect of the St. of 1877, and, it must be presumed, the intention of the Legislature, were that actions for causes already accrued, to enforce the liability, unlimited in amount, under the Gen. Sts. *c.* 44, §§ 1, 22, might still be brought by either party into this court for trial, according to the statutes which regulated the jurisdiction of such actions; but that actions to enforce the qualified liability imposed by the St. of 1877, and in which no greater amount of damages could be recovered than is in the county of Suffolk within the exclusive jurisdiction of the Superior Court, should throughout the Commonwealth be brought and tried exclusively in that court, in which, from the greater frequency of the terms, a more speedy trial could be had, and the dockets of this court be thus relieved from the pressure of a large class of cases which often turn on mere questions of fact, and which greatly interfere with the transaction of business that is within the exclusive jurisdiction of this court.

The result is, that the present action, for a cause existing before the St. of 1877 took effect, and in which the plaintiff demands, and, if she proves, may recover damages to the amount of $20,000, might, after the passage of this statute, have been brought by the plaintiff in this court, and, having been brought by her in the Superior Court, was duly removed by the defendant, and must stand for *Trial in this court.*

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AUGUSTINE D. AVERY, executor, *vs.* WILLIAM W. RUSSELL.

Essex. November 7, 1878. ENDICOTT & LORD, JJ., absent.

In an action on a judgment recovered by the plaintiff against the defendant, the latter filed a declaration in set-off, alleging that the judgment was assigned by the plaintiff to M., and that he was indebted to the defendant. It appeared in evidence that the plaintiff agreed to sell to M. the judgment declared on, and executed an assignment of it and sent it by express, directing its delivery to M. upon his paying a sum stated; that M. suggested to H. to purchase the judgment, and H. paid the required sum to the expressman, and M. at the same time executed an assignment of the execution to H., who thereupon directed this action to be brought on his behalf in the name of the plaintiff and by his authority; that H.'s purchase of the judgment was in his own interest solely, and M. had never had any right or property in the same, otherwise than as above stated; and that, after the arrangement between M. and H., but before it was consummated, M. was notified by the defendant of the claim declared on in set-off. *Held*, that the demand against M. could not be set off in this action.

CONTRACT on a judgment recovered by the plaintiff against the defendant. Writ dated January 24, 1877. The defendant filed a declaration in set-off, alleging that the judgment was assigned by the plaintiff to Martin L. Marsh, and that Marsh had previously executed a bond to the defendant, and had committed a breach thereof; and set forth the bond and the breach.

At the trial in the Superior Court, without a jury, the plaintiff proved the recovery of the judgment, and that it remained unsatisfied when this action was brought; and the following facts appeared: In December, 1875, Marsh proposed to the plaintiff to purchase the judgment. The plaintiff agreed to sell the same to him for the sum of $60, executed an assignment of it upon the execution issued on the judgment, and forwarded the execution by express to Haverhill, directing its delivery to Marsh, upon his paying to the expressman the sum of $60. Marsh, not being able or disposed to pay the sum required, suggested to William Hale to purchase the judgment, and Hale paid $60 to the expressman, and Marsh at the same time executed an assignment of the execution to Hale, who thereupon directed this action to be brought on his behalf in the name of the plaintiff and by his authority. Hale's purchase of the judgment was in his own interest solely, and Marsh has never had any right or property in the same, otherwise than such as has hereinbefore

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been stated. After this arrangement between Marsh and Hale, but before it was consummated, Marsh was notified by the defendant's attorney of the claim declared on in set-off. The defendant had notice also that the judgment was within the control of Marsh.

The defendant introduced evidence of the execution of the bond declared on in set-off, and of the breach thereof, (which it is unnecessary to state,) and requested a ruling that, upon the assignment of the judgment by the plaintiff to Marsh, the right accrued to the defendant to set off the penalty of the bond against the amount of the judgment, and that the effect of that assignment could not be controlled by proof of a subsequent assignment from Marsh to Hale. But *Brigham*, C. J., refused so to rule, and ordered judgment for the plaintiff; and the defendant alleged exceptions.

J. P. Jones, for the defendant.

S. B. Ives, Jr. & J. K. Jenness, for the plaintiff, were not called upon.

By the Court. Upon the facts stated in the bill of exceptions, it is quite clear that this action is not brought by Marsh, nor for his use or benefit, but is brought in the name of Avery for the use and benefit of Hale; and consequently no demand against Marsh can be set off in this action. Gen. Sts. *c.* 130, §§ 1, 11. *Sheldon* v. *Kendall*, 7 Cush. 217. It is therefore unnecessary to consider other objections to the set-off.

Exceptions overruled.

Zenas S. Harding *vs.* Isaac P. Noyes, administrator.

Essex. November 7, 1878. Endicott & Lord, JJ., absent.

Answers to interrogatories, signed and sworn to only by the attorney of the party interrogated, are insufficient under the Gen. Sts. *c.* 129, § 49, requiring such answers to be "in writing, signed by the party and upon his oath."

It is within the discretion of a judge either to order a nonsuit to be entered at the expiration of the time fixed for answering interrogatories filed under the Gen. Sts. *c.* 129, § 46, or to allow further time; and, from the exercise of such discretion, an appeal does not lie to this court.

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CONTRACT against the administrator of a surety on a bond to dissolve an attachment. The writ was entered, and an answer filed, at December term 1876 of the Superior Court.

On October 11, 1877, the defendant filed interrogatories to be answered on oath by the plaintiff. On January 2, 1878, the court ordered answers to the interrogatories to be filed on or before March 1; and, on February 25, extended the time for filing such answers to March 11. On March 8, the attorney of the plaintiff moved for further time to answer the interrogatories; and filed his own affidavit, stating in detail his efforts to obtain answers from the plaintiff, his belief that the plaintiff was unwilling to answer and had assigned his interest in the action to another person, and that the attorney had a lien on the judgment rendered in the suit in which the attachment was made. The court overruled the motion. On March 9, the attorney filed answers to the interrogatories signed and sworn to by himself "in behalf of the plaintiff, Zenas S. Harding, and in his own behalf as claimant of lien on judgment on which this suit is founded." On March 22, the court ordered a nonsuit; and the plaintiff appealed to this court.

C. Lamson, for the plaintiff.

E. F. Stone, for the defendant, was not called upon.

BY THE COURT. The answers, signed and sworn to by the attorney only, did not comply with the requirement of the statute that they should be signed by the plaintiff himself, and upon his oath. Whether a nonsuit should be entered at the expiration of the time previously fixed for answering, or further time be allowed to obtain proper answers, was exclusively within the discretion of the court below. Gen. Sts. *c.* 129, §§ 46, 48, 49, 56. *Townsend* v. *Gibbs*, 11 Cush. 158. *Stern* v. *Filene*, 14 Allen, 9.

Judgment affirmed.

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HUMPHREY MOOAR *vs.* FREDERIC HARVEY.

Essex. November 8, 1878. ENDICOTT & LORD, JJ., absent.

If a judge, after he has concluded his charge to the jury, gives further instructions, they are a subject of exception.

At the trial of an action upon a promissory note, the defence to which was the statute of limitations, the only question was whether the defendant had, within the meaning of that statute, been absent from and residing out of the Commonwealth; and the intention of the defendant was a fact in controversy. The judge instructed the jury that, if the defendant resided out of the Commonwealth, his intention was immaterial; and that, if they were in doubt as to his residence, they might consider his intention as matter of evidence. *Held*, that the instructions were contradictory and insufficient.

CONTRACT upon four promissory notes, signed by the defendant, payable to the plaintiff, or order, on demand, and dated respectively October 19, 1861, December 14, 1861, February 19, 1862, and August 15, 1862. Writ dated July 23, 1877. Answer, the statute of limitations.

At the trial in the Superior Court, before *Rockwell*, J., the issue was whether the defendant had, within the meaning of the Gen. Sts. *c.* 155, § 9, been absent from and residing out of the state. It appeared that he had a wife, but no children; and it was agreed that, previously to September, 1862, he had a residence in Lawrence. In September, 1862, he gave up business in Lawrence, and enlisted in the Massachusetts volunteers. In September, 1863, he was discharged, and at once reënlisted in the regular army for five years, and served his full term. He was stationed at Washington after February, 1864, being detailed as a bookkeeper in the office of the surgeon general, and in each year had a short furlough, which he spent in Lawrence, with his mother, where there was a room, fitted up with some furniture of his, which he occupied when there. He also spent part of the time at his father-in-law's, in Boston. His wife spent most of her time, when in this Commonwealth, at her father's house, where her furniture had been returned, but spent the winter months in Washington with her husband, since September, 1864; and the defendant testified that she spent the summer months in this Commonwealth because she was an invalid. At the expiration of his term of service, on September 12, 1868, he

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returned to his mother's in Lawrence, and remained there most of the time until February, 1869, when he returned to Washington as a government clerk, which position he has since held. His vacations were then longer, about thirty days, but were spent as before.

He testified that he claimed Lawrence as his home, and intended to return there if he lost his situation; that he owned or hired no house in Lawrence, and had no boarding place there, his mother having died in June, 1877; and that he voted and paid a tax there in 1864, and in Boston in 1870. The city treasurer of Lawrence testified that the defendant was not assessed in Lawrence in 1864, and the defendant did not contend that he had been taxed there any other year since 1862; and there was other evidence upon the part of the plaintiff and defendant upon the question at issue. The defendant contended that his presence in Washington was temporary, without an intention to make it his permanent home.

At the conclusion of the charge to the jury, the defendant presented to the judge a written request for certain instructions to the jury upon the effect of the defendant's intent upon the question of domicil. But the judge declined to receive it then as a request for instructions; and thereupon instructed the jury, that the question was, whether the defendant was absent from and residing away from the state; that if he resided out of the Commonwealth, his intention was immaterial; that if the jury were in doubt as to his residence, they might consider his intention as matter of evidence; and that residence for this purpose had the same meaning as domicil. This was all that was said to the jury directly upon the question of the defendant's intent.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. U. Bell, for the defendant, was stopped by the court.

W. S. Knox, for the plaintiff.

GRAY, C. J. Although a judge is not bound to receive a request for instructions after he has concluded his charge to the jury, yet, if he does give further instructions, they are a subject of exceptions. The defendant's intention was a fact in controversy at the trial, and was in law a material element in determining whether he resided out of the Commonwealth, within

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the meaning of the statute of limitations. Gen. Sts. *c.* 155, § 9. *Langdon* v. *Doud*, 6 Allen, 423, and 10 Allen, 433. *Hallet* v. *Bassett*, 100 Mass. 167. *Perkins* v. *Davis*, 109 Mass. 239. The instructions given, informing the jury, in one breath, that if the defendant resided out of the Commonwealth his intention was immaterial, and, in the next, that if the jury were in doubt as to his residence they might consider his intention as matter of evidence, were contradictory and insufficient, and tended to confuse, if not to mislead the jury; and having been specifically excepted to, the *Exceptions must be sustained.*

JAMES DUGAN *vs.* DANIEL A. NICHOLS.

Essex. November 8, 1878. ENDICOTT & LORD, JJ., absent.

Testimony of an assignee in bankruptcy that he would not have given up to the purchaser certain goods, sold by the bankrupt before the bankruptcy, but remaining in his possession, even if demanded, unless ordered so to do by his counsel, will warrant a jury in finding an unlawful detention of the goods such as will support replevin against him.

REPLEVIN of 13 barrels of oil. Writ dated July 10, 1874. After the former decision, reported *ante*, 43, the case was tried in the Superior Court, before *Colburn*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff offered evidence tending to prove that he purchased the oil of the firm of Shaw & Bruce, of which the defendant was the assignee in bankruptcy, and paid for the same; and that the oil was, when purchased, in a shed belonging to the firm, where it remained until it was replevied. The plaintiff also offered evidence tending to prove a demand upon the defendant before the date of the writ.

The defendant testified that he found the oil in question on the premises of Shaw & Bruce; that he never heard that the oil belonged to the plaintiff, until the plaintiff told him so about a week before the date of the writ; that the plaintiff never made any demand upon him; and upon cross-examination, in reply to the question, "If you had understood Dugan demanded the oil,

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should you have given it up?" answered, "I should not, unless my counsel had ordered me to." Upon rëexamination, he testified that he had no recollection that the question of what he might have done had ever entered his mind until he was asked the question as above.

The defendant requested the judge to rule that it was not a question of what the defendant now thought he might have done; that if the defendant's testimony was taken as true, it would not exempt the plaintiff from making a demand before bringing his action; and that there was no evidence of a conversion. The judge declined so to rule; but ruled that, if the jury believed the defendant's testimony, there was evidence upon which they might find a conversion. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. Sewall, for the defendant.

S. B. Ives, Jr., for the plaintiff, was not called upon.

BY THE COURT. The testimony of the defendant warranted the jury in finding an unlawful detention of the goods, which was all that was necessary to support replevin by the rightful owner. Gen. Sts. *c.* 143, § 10. *Whitman* v. *Merrill*, *ante*, 127.

Exceptions overruled.

JOHN J. COKER *vs.* GEORGE ROPES.

Essex. November 18. — 29, 1878. COLT & MORTON, JJ., absent.

It is no ground of objection to the report of an auditor, that, for the purpose of determining the issues submitted to him, he construes a contract, the construction of which is involved in such determination.

It is within the discretion of a judge to exclude a general question put to a witness, which calls for a mere repetition of his previous testimony.

A refusal to give an instruction requested, based on facts not appearing in the bill of exceptions, affords no ground of exception.

An agent, who enters into a written agreement with his principal, by which he engages to execute the orders of the latter "to the best of his ability," is bound to carry out such orders according to the terms of his engagement, and is deprived of all discretion as to their execution, or any right to call in question their prudence, provided they are explicit and intelligible, and he is furnished by his principal with the necessary means.

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CONTRACT to recover one year's salary at $2000, upon an agreement under seal, by the terms of which the plaintiff was to act as the agent of the defendant at port or ports to the eastward of the Cape of Good Hope, in the Zanzibar trade. The agreement contained the following clauses: "Said Coker will to the best of his ability execute such orders as he may receive from said Ropes in the pursuance of said Zanzibar trade." "This agreement is to continue in force for one year from December 2, 1874, and thereafter until a reasonable and proper notice is given to the other of a desire to terminate this agreement. It is also agreed by said Ropes to pay to said Coker, during the continuance of this agreement, a salary at the rate of $2000 per annum for the time said Coker is employed," in monthly instalments, to commence December 2, 1874.

The answer admitted the making of the agreement, but alleged that the plaintiff had not executed the orders received from the defendant, and had not faithfully performed his contract; and that damage was thereby caused to the defendant.

The case was referred to an auditor "to state the accounts between the parties, and to make report thereof to the court." The auditor's report stated that the plaintiff was employed in the defendant's service for nine months, when he was discharged by the defendant; that, while so employed, he received from the defendant full and minute instructions in writing as to the conduct of the business, which he disobeyed; "that the plaintiff, by his neglect and disobedience of instructions and failure to execute orders as given, forfeited his right to a continuance of the contract and to a recovery for the full amount of the salary as claimed by him;" that, for the time he was in the defendant's service, he had been paid, according to the terms of the contract, all but the sum of $120.29; that the defendant had sustained losses, by the neglect and refusal of the plaintiff to obey orders, to a greater amount than this sum; that "the defendant is entitled to recoup the same in this action to the amount of the balance remaining unpaid upon the plaintiff's claim in this action, and that there is nothing due from the defendant to the plaintiff."

In the Superior Court the plaintiff objected to the auditor's report upon the following grounds: "1. That the auditor, in

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addition to stating the accounts between the parties, had also passed upon the legal rights of the plaintiff under his contract, to wit, that he has forfeited his right to a continuance of the same and to a recovery of a full amount of salary as claimed by him. 2. That the auditor passed upon the legal construction of the contract, in limiting the time stated therein that the plaintiff was in the defendant's service. 3. That the auditor finds that the defendant is entitled to recoup in this action, which is purely a question of law. 4. That the report is in substance, aside from the statement of the accounts, a legal conclusion upon the summary of the facts found by the auditor." The plaintiff also moved the court to reject the parts of the report referred to, as not being competent evidence for the jury, on the ground that the auditor had exceeded his authority in passing upon the same. But *Brigham*, C. J., overruled the motion, and ruled that the auditor had not exceeded his authority in passing upon the matters objected to, under the rule of reference.

The plaintiff testified that he arrived at Zanzibar about January 9, 1875; that before leaving this country, and on his way to Zanzibar, he received instructions from the defendant; that he received an order to purchase one hundred bales of cloves, but could not fill the same except by purchasing more than the order called for; that in reference to a shipment of ivory, he was unable to obtain the quantity of the quality needed and called for by the instructions; that he drew letters of credit upon Baring Brothers, (which, by the instructions, he was to do only in the event of his not being able to borrow money of a certain banker at nine per cent.,) and shipped a cargo of produce to meet the same; and that, at the time of drawing said letters of credit, he was unable to borrow as directed; that he followed his instructions implicitly, so far as was practicable, under the circumstances. He also testified as to all of his orders from the defendant, the mode of his execution of them in detail, and explained the reason of his conduct in these matters. His counsel then proposed to ask him the following question: "Did you execute the orders of the defendant to the best of your ability?" The judge refused to allow this question to be put, on the ground that it called for the opinion of the witness upon matters of which he had been permitted to testify fully.

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The defendant put in evidence tending to contradict the plaintiff's evidence as to the reasons given by him for violating the instructions; and testified that he had lost, by reason of the plaintiff's neglect to obey the instructions, more than the amount which the plaintiff claimed to be due under the contract; that, after the plaintiff had drawn upon the letters of credit, he sent to Aden and purchased drafts on London some four months prior to the time when the letters of credit became due, for the purpose of obtaining funds with which to pay the letters of credit, which purchase of drafts cost him over one thousand dollars. On cross-examination, he testified that he did not use the identical drafts purchased at Aden to pay the credit on Baring Brothers, but used the same in the ordinary course of his business, and out of his business afterwards paid the letters of credit when they became due.

The plaintiff requested the judge to rule "that the language of the contract, that the plaintiff 'will to the best of his ability execute such orders as he may receive from' the defendant, refers to his mental ability and not physical ability, and is synonymous with the expression that the plaintiff 'will to the best of his understanding execute;' that if there is any doubt or uncertainty as to the exact sense in which the word ability is used in the contract, then it is a question for the jury to pass upon; that if the plaintiff merely erred in judgment, or if, acting in good faith in the performance of his duties, he committed a mistake in carrying out the directions of the defendant, it would be no bar to his recovering the amount sued for; that to entitle the defendant to recoup in damages, it must be proved that the plaintiff either negligently, carelessly or wilfully disobeyed the instructions given him by the defendant; that if any act of the defendant in the management of his business in connection with his agency at Zanzibar in any manner contributed towards occasioning the loss for which he seeks to recoup in damages, he cannot recoup in this action."

But the judge declined so to rule; and instructed the jury "that the plaintiff was, to the best of his ability, to execute the orders which he received from the defendant, and this required the plaintiff to do all that he was able to do, or that it was possible or practicable for him to do, to execute the defendant's

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orders, and deprived him of all discretion as to the execution of these orders, or any right to call in question the prudence of these orders, or any right to know the facts or motives which induced the defendant to give such orders, provided these orders were explicit and intelligible, and the defendant furnished him the means necessary to execute these orders; that the plaintiff's only excuse for not executing the orders received by him must have been the impossibility of executing them by him with the means furnished him by the defendant, or the fact that the orders, considering them according to the ordinary import of the language in which they were expressed, were not explicit, or were equivocal; and that the orders were difficult of execution would not excuse the plaintiff, unless that difficulty was such as to cause their execution to be to him, and in the circumstances in which he was placed, practically impossible, or such as he was not able to execute."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

C. Sewall, for the plaintiff.

S. B. Ives, Jr. & S. Lincoln, Jr., for the defendant, submitted the case without argument.

GRAY, C. J. The ruling as to the effect of the auditor's report conformed to the well settled law. An auditor, for the purpose of passing upon the matter referred to him, must necessarily construe any contract the construction of which is involved in such determination; his views of the law being, of course, subject to revision by the court, and his findings of fact to revision by the jury. *Peru Co.* v. *Whipple Manuf. Co.* 109 Mass. 464. *Holmes* v. *Hunt*, 122 Mass. 505.

It was within the discretion of the presiding judge to exclude the general question put to the plaintiff by his counsel, as asking for a mere repetition of his previous testimony.

There were no facts in the case to call for the last instruction requested; and the instructions given were correct and sufficient, and in accordance with the cases on which the plaintiff relied at the argument. *Forrestier* v. *Bordman*, 1 Story, 43. *Greenleaf* v. *Moody*, 13 Allen, 363. *Exceptions overruled.*

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FREDERICK A. ROBINSON *vs.* AUGUSTUS R. B. SPRAGUE.

Suffolk. March 29. — November 8, 1878.

A demand, under the Gen. Sts. *c.* 123, § 63, by a mortgagee of a chattel, upon an officer, who had attached the chattel as the property of the mortgagor, stated that the mortgage was given to secure a certain sum, which sum was then due and interest accrued thereon, and gave the date of the mortgage, (which was eighteen days before the date of the demand,) and the place of record. In fact, the rate of interest reserved in the mortgage was seven per cent. *Held*, that this error did not invalidate the demand.

In an action by a mortgagee for the conversion of personal property, attached by the defendant, on a writ against the mortgagor, in whose possession the property was, the defendant is not entitled to have the fact that, after the expiration of the ten days limited by the Gen. Sts. *c.* 123, § 63, the property was returned to the mortgagor, considered in mitigation of damages.

COLT, J. The plaintiff seeks to recover the value of personal property mortgaged to him, which was attached by the defendant's deputy, as the property of the mortgagor. A written demand was made on the attaching officer for the payment of the money due on the mortgage, which was not complied with, and the officer continued to hold the property under his attachment for more than ten days thereafter. The first question is, whether the plaintiff's demand contained a just and true account of the debt for which the property was liable to him, within the requirements of the Gen. Sts. *c.* 123, § 63.

The demand, which was dated August 12, 1875, stated that the mortgage under which the plaintiff claimed, given by George E. Whittum and dated July 24, 1875, was recorded in the town records of Ashburnham, and was made to secure the payment of $250, which sum was then due with the interest accrued thereon. It demanded payment of the mortgage and interest thereon. This implies interest at six per cent. computed from the date of the mortgage, unless controlled by the reference to the mortgage; by which it appears that the note of even date with the mortgage was to bear seven per cent. interest. It is not necessary to constitute a good demand, that the interest should be computed and added to the principal sum. *Jones* v. *Richardson*, 10 Met. 481. If the inaccuracy, in not stating the actual rate of interest, is not cured by reference to the mortgage, then the only ground of complaint is, that the plaintiff demanded about

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twelve cents less than he had a right to demand, being one per cent. interest on $250 for eighteen days. There was no objection to the notice, except that it did not state the rate and time from which the interest was to be computed.

In *Harding* v. *Coburn*, 12 Met. 333, it was held that the jury were rightly instructed that the plaintiff must prove that the written statement which he made to the officer, of the debt for which the property was liable to him, was substantially true and correct, but that no slight, innocent and immaterial misstatement would defeat his action. In *Rowley* v. *Rice*, 10 Met. 7, it was said that, if more was demanded than the amount due, it would not avail the plaintiff unless the error was the result of accident or mistake, and unless the value of the property attached was less than the just and true sum for which it was pledged, so that the attaching creditor was not injuriously misled by the error, and had not suffered any pecuniary loss. *Bicknell* v. *Cleverly*, *ante*, 164. It is plain that the error in this case could not have been material. *Averill* v. *Irish*, 1 Gray, 254. *Johnson* v. *Sumner*, 1 Met. 172. *Hills* v. *Farrington*, 6 Allen, 80.

The remaining question is, whether the defendant is entitled to have the fact, that the attached property, after the expiration of the ten days, was returned to the mortgagor, considered in mitigation of damages. The statute provides that if the amount demanded is not paid, or tendered to the mortgagee, within ten days, the property "shall be restored to him." The legal title to the property was all in the mortgagee. He had the right, by the terms of the mortgage, to its immediate possession when first attached on mesne process. He alone could maintain an action of tort for its conversion. *Ring* v. *Neale*, 114 Mass. 111. The failure to restore the property to him within the time limited by the statute, or to pay the amount due on his mortgage, was an unlawful conversion of his property, for which, upon the facts here stated and found by the judge, he was entitled to recover the value. The plaintiff's right to treat it as a conversion was fixed by the expiration of the ten days without payment of his claim, or a return of the property. The question is not whether a restoration to the mortgagor on the demand of the mortgagee, within the ten days, would be sufficient to discharge the liability of the attaching officer; no such return of the property was

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attempted until after the liability of the officer in trover had arisen; and there is no suggestion that its value exceeds the just claim of the plaintiff under his mortgage. *Forbes* v. *Parker*, 16 Pick. 462. *Howe* v. *Bartlett*, 8 Allen, 20. *Alden* v. *Lincoln*, 13 Met. 204.

There was no occasion for the application of the rule which permits the defendant, in an action of trover, to show that the property had gone from his possession to the plaintiff, or to his use, or to a party who, as against the plaintiff, had the better title to it; *Hanson* v. *Herrick*, 100 Mass. 323; because the judge must have found as a fact that Whittum, the mortgagor, was not the agent of the plaintiff for the purpose of receiving and receipting for the property, and the evidence reported justifies the finding. *Exceptions overruled.*

H. C. Hartwell & W. H. Orcutt, for the defendant.

C. R. Train & J. O. Teele, for the plaintiff.

Augustus L. Ware *vs.* First Congregational Society in Georgetown.

Suffolk. November 12, 1878. Colt, Morton & Soule, JJ., absent.

In an action for the conversion of parts of an organ, covered by a mortgage conditioned that the mortgagor should not remove the same from his organ factory without the mortgagee's written consent, it appeared that the mortgagee subsequently found such parts in an organ in a church, and informed a committee of the church that he had a mortgage which "included their organ or parts of it, and demanded the property," exhibiting to them the mortgage. They replied that they "knew nothing about it," and refused to do anything. *Held*, that there was no evidence of a conversion.

Tort for the conversion of parts of an organ.

At the trial in the Superior Court, before *Bacon*, J., it appeared that on July 21, 1874, the plaintiff took a mortgage of Joel Butler, covering property in his manufactory in Boston, describing it as "lumber, tools, benches, hand-screws, clamps, parts of organs finished and unfinished, pipes, wind-chests, bellows, action and voices, and all and everything else contained in my organ manufactory," and conditioned that Butler should not at-

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tempt to sell or to remove any of the mortgaged property from his shop without the written consent of the mortgagee.

The plaintiff testified that, at the time the mortgage was made, certain parts of the organ, which he subsequently saw in the defendant's church, were in Butler's shop; that in February, 1875, he went to Georgetown and saw one or more members of a committee of the defendant, admitted to be authorized to represent it, and asked them if Butler had built them an organ, to which they replied in the affirmative; that he then told them that he had a mortgage from Butler which "included their organ, or parts of it, and demanded the property," at the same time exhibiting the mortgage; and they replied that they "knew nothing about it," and refused to do anything.

The judge ruled that there was no sufficient evidence of demand and refusal to authorize the jury to find a conversion, and directed a verdict for the defendant, which the jury accordingly returned; and the plaintiff alleged exceptions.

D. F. Fitz, for the plaintiff, cited *Chamberlin* v. *Shaw*, 18 Pick. 278; *Willard* v. *Rice*, 11 Met. 493; *Harding* v. *Coburn*, 12 Met. 333; *Magee* v. *Scott*, 9 Cush. 148; *Riley* v. *Boston Water Power Co.* 11 Cush. 11; *Putnam* v. *Cushing*, 10 Gray, 334; *Simpson* v. *Carleton*, 1 Allen, 109; *Adams* v. *Wildes*, 107 Mass. 123.

S. B. Ives, Jr. & G. A. Goddard, for the defendant, were not called upon.

By the Court. There was no evidence of a tortious taking, or of a definite demand or a definite refusal; in short, no evidence whatever of a conversion. *Exceptions overruled.*

William W. Eastham *vs.* James A. Riedell & another.

Suffolk. Nov. 12. — 13, 1878. Colt, Morton & Soule, JJ., absent.

On the issue of ordinary care by a bailee, if the evidence is conflicting as to the circumstances of the case, a question to an expert, as to the practice and care of others in the same business as the defendant, "under like circumstances," may properly be excluded.

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TORT for injuries to the plaintiff's horse, alleged to have been caused by the negligence of the defendants.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared in evidence that the defendants were stable-keepers in Boston, and, as a part of their business, received horses to board; that in June, 1873, they took the plaintiff's horse to board, and continued to board it at their stable until January, 1876; that on August 30, 1874, one McNeil, a boy in the plaintiff's employ, and known by the defendants to be so employed, came to their stable and took the plaintiff's horse away, stating to the defendants' servants that the plaintiff desired him to get his horse and meet him at a certain place; that the horse, while in McNeil's possession, was thrown down and injured; and that, previously to this occasion, McNeil had several times driven the horse to the stable by direction of the plaintiff. Both the plaintiff and McNeil testified that the latter had no authority from the plaintiff to take the horse from the defendants' stable, and McNeil also testified that he had not taken the horse away from the stable on any other occasion. The defendants called several witnesses, men in their employ in 1874, who testified that the same boy, who took the plaintiff's horse away on the day of the accident, had driven the horse to the stable several times previously, and on two or three occasions taken the horse from the stable; and that they knew that the boy was in the employ of the plaintiff.

The defendants proposed to ask several stable-keepers, who were in attendance upon the trial, the following question: "What is the practice of stable-keepers in relation to the delivery of horses, under circumstances like those of this case?" and also offered to prove, by testimony of stable-keepers, that the same care was exercised in relation to the plaintiff's horse which was usually exercised under like circumstances by other stable-keepers in Boston, as bearing upon the question of ordinary care. But the judge excluded this evidence.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

C. A. Carpenter, for the defendants.

A. Russ, for the plaintiff.

BY THE COURT. The testimony admitted as to the circumstances of the case on trial was conflicting, and the inquiry as to

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the practice and the care of other stable-keepers "under like circumstances" might therefore be properly excluded as affording no definite basis for the testimony and the opinion of the witnesses. *Exceptions overruled.*

NATHAN B. GOODNOW *vs.* CALVIN A. HILL & wife.

Suffolk. Nov. 12.— 13, 1878. COLT, MORTON & SOULE, JJ., absent.

If, in an action on a joint promissory note against husband and wife, the plaintiff discontinues as to the husband by reason of proceedings in bankruptcy against him and proof of the note against his estate, he is entitled to prosecute his action to judgment against the wife.

The admission of evidence, which is excluded as soon as it appears to be incompetent, with a strict caution to the jury not to regard it, affords no ground of exception.

On the issue whether certain notes were given in payment of another note or as collateral security, there was evidence that such notes were sold, but it did not appear that they were sold before the maturity of the principal debt. The judge instructed the jury that the giving and acceptance of such notes were *primâ facie* evidence of payment, but it was for them to say whether, upon all the evidence, they were received in payment. *Held*, that there was no ground of exception.

Under the St. of 1874, *c.* 184, a promissory note made by a married woman jointly with her husband, the consideration for which was borrowed money paid by her direction to her husband, binds her; and the fact that a portion of such money was previously advanced to the husband, to which the wife subsequently assented, is immaterial.

A point not taken at the trial is not open upon a bill of exceptions.

CONTRACT on the following promissory note signed by a husband and wife: "$600. Boston, March 28, 1876. One month after date we promise to pay to the order of N. B. Goodnow six hundred dollars value received at any bank in Boston. Due May 1." Writ dated October 20, 1876.

At the trial in the Superior Court, before *Rockwell*, J., the defendants moved for a continuance to await the result of bankruptcy proceedings still pending in the United States District Court against the husband. The plaintiff thereupon discontinued the action as to him, and proceeded against the wife. It was admitted that the husband was, in December, 1876, adjudicated a bankrupt on his petition filed in November, 1876; and that at the first meeting of his creditors the plaintiff duly proved against his estate the note in question. The wife asked the

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judge to rule, upon the above facts, that the plaintiff could not recover, because he had voluntarily discontinued as to one of the joint makers, and because the plaintiff had proved the note in question in bankruptcy as above. The judge refused so to rule.

The wife also offered evidence tending to show that her husband had, on or about May 20, 1876, given to the plaintiff two notes signed by himself, one for $600, payable in four months, and one for $85, or $110 as bonus and interest, in payment and satisfaction of the note in suit. The plaintiff then offered evidence tending to show that the $600 note of May 20 was given as collateral security for the note in suit, and for his accommodation and not as payment; that he had the note of May 20 discounted, and received the proceeds, but had to take it up at maturity; but that there was no sale under the provisions of the statutes as to sale of pledges. The wife contended that the sale of the note of May 20 was *primâ facie* evidence that it was received by the plaintiff in payment of the note in question; but the judge refused so to rule.

The husband was a witness for the wife; and the plaintiff, to affect his credit, offered to show that he had been convicted of committing an abortion, and for that purpose introduced evidence that an indictment had been found against him for such offence. It appeared from the record that the indictment was laid on file, and that the husband had never been found guilty nor pleaded guilty on such charge. This evidence was all excluded, and the jury were cautioned by the judge not to regard it.

The wife also asked the judge to rule that the giving of the notes of May 20, 1876, and their acceptance by the plaintiff, were *primâ facie* evidence that they were given in payment of the note in question. The judge ruled that it was *primâ facie* evidence; but, as there was other evidence also bearing upon that point, that it would be for the jury to find whether or not they were received in payment on all the evidence; that there was no evidence in the case tending to show that the husband had ever been convicted of any criminal offence; that if the note in question was given for the husband's debt, the wife was not liable in this action, unless the plaintiff, with the burden of proof upon him, had satisfied the jury that she knew that the consideration

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of the note was borrowed money; and that if, on the day it was borrowed, the note was signed by the husband and wife, and the wife then directed the plaintiff to pay the money to the husband, the wife was liable upon the note. It appeared that when the wife and husband met the plaintiff, the sum lent was paid by the plaintiff to the husband, excepting $150, which, in the forenoon of the same day, had been advanced by the plaintiff to the husband, at his request, to take up a note of his due that day. The judge ruled that if the jury were satisfied that at the meeting of the husband and wife with the plaintiff, in the afternoon, the wife assented to this advance, as well as directed the payment of the balance to the husband, the fact of the advancement of the $150 was immaterial.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. W. Searle & J. L. Eldridge, for the defendant.

J. M. Way, for the plaintiff.

GRAY, C. J. The proceedings and proof in bankruptcy against the husband might bar the action against him. *Bennett* v. *Goldthwait*, 109 Mass. 494. *Valpey* v. *Rea*, 124 Mass. 99. But the plaintiff, upon discontinuing against him, was entitled to prosecute the action to judgment against the other defendant. Gen. Sts. *c.* 133, § 5; *c.* 129, § 41; *c.* 156, § 2. *Goodnow* v. *Smith*, 18 Pick. 414. *Hathaway* v. *Crocker*, 7 Met. 262, 268.

The evidence introduced to show the conviction of the husband, in order to impeach his credibility as a witness, having been excluded by the court as soon as it appeared to fall short of proving the conviction, and the jury having been strictly cautioned not to regard it, its introduction is no cause of exception. *Hawes* v. *Gustin*, 2 Allen, 402.

The judge having instructed the jury that the giving and acceptance of the subsequent notes were *primâ facie* evidence of payment of the note in suit, and having submitted the question of payment to the jury upon all the evidence, there is no just ground of exception upon that question. If the subsequent notes were taken as collateral security, it does not appear, and is not to be presumed, that they were sold before the maturity of the principal debt, in violation of the Gen. Sts. *c.* 161, § 65. *Norcross* v. *Pease*, 5 Allen, 331.

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As to the liability of the wife upon the note in suit, the instructions given to the jury were quite favorable enough to her, upon the questions presented at the trial. *Major* v. *Holmes*, 124 Mass. 108. *Kenworthy* v. *Sawyer*, *ante*, 28. The point, suggested on the brief of her counsel, that, if she was a surety for her husband, the proof, against his estate in bankruptcy, of the note in suit operated as a surrender of the notes held as collateral security, and so released her from liability, does not appear to have been made in the court below, and therefore is not open in this court. *Exceptions overruled.*

WILLIAM H. DAVIS, executor, *vs.* MICHAEL NEY.

Suffolk. Nov. 21, 22, 1877; Nov. 12. — 15, 1878.

A., a depositor in a savings bank, delivered her bank book, accompanied by an assignment of her deposits, to B., upon an oral agreement that B. should draw for her what money she wanted during her lifetime, and pay the balance, if any, left at her death to her son. In pursuance of this agreement, B. paid to A. certain sums of money before her death, and the balance remaining after her death he paid to her son, who was appointed executor of her will. *Held*, that the delivery and assignment to B. constituted a valid gift, and that the son was not bound to account as executor for the money so received by him.

APPEAL from a decree of the Probate Court allowing the account of the executor of the last will of Mary Ney. The case was reserved by *Morton*, J., for the determination of the full court, on an agreed statement of facts, in substance as follows:

Previously to September 24, 1875, Mary Ney deposited in her own name, in the Union Institution for Savings in Boston, various sums of money, her sole property, at various times, which amounted, on that day, to $5220, for which she held six separate bank books. On September 24, by an assignment not under seal, she assigned her deposits and delivered her bank books to George F. Emery, the treasurer of the bank. The only consideration for the assignment and delivery was that Emery was to draw for her whatever she wanted during her lifetime, and the balance, if any, left at her death, was to be paid by Emery to her son. Emery made no written agreement in reference to the matter, and her son was not informed of it until after her de-

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cease. Emery drew and paid to her, on account of the deposits, various sums at various times between September 24, 1875, and October 4, 1876, amounting in the whole to $2034, including amounts of interest drawn as such. When these sums were drawn, her signature was required by Emery to show that he drew nothing for his own use, and Emery's signature was required by the bank. Sometimes, in Emery's absence, pursuant to his directions to the bank clerks to allow her so to do, she drew money on account of the deposits.

Mary Ney died on October 4, 1876, leaving no debts; a husband, to whom she had been married before 1875; and one son, whom, by a will made without her husband's consent, and afterwards admitted to probate, she made her executor and sole legatee. Since her decease, Emery paid to her son the balance remaining of her deposits, amounting on September 17, 1877, to $3705; and subsequently her son filed his account as executor, not charging himself therewith, or with any part thereof. His account was allowed by the Probate Court, and the husband appealed.

If the court should be of opinion that the residue of the deposit belonged to the estate of the deceased, then the decree of the Probate Court was to be reversed, and the case remitted for the amendment of the executor's account accordingly; otherwise, the decree was to be affirmed.

W. S. Stearns, for the appellant.

J. A. Maxwell, for the appellee.

ENDICOTT, J. The delivery of the bank books to Emery, accompanied by an assignment, constituted a valid gift, and gave to him a complete title in the fund represented by the books. *Foss* v. *Lowell Savings Bank*, 111 Mass. 285. *Kingman* v. *Perkins*, 105 Mass. 111. *Kimball* v. *Leland*, 110 Mass. 325. In form, the conveyance to Emery was absolute; but it appears from the statement of facts that it was accompanied by an oral agreement, between Mrs. Ney and Emery, that he should pay her during life such sums as she wanted, and that upon her death he should pay over the balance to her son. In execution of this agreement, he paid her a considerable sum of money before her death, and what remained after her death he paid to the son. The appellant contends that this was not a complete

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gift; that it was an attempt to evade the statute of wills; and that the transaction was a mere form, the nominal title being in Emery, and the real ownership and possession being in Mrs. Ney.

It was in the power of Mrs. Ney to make this disposition of her own property. If the trust upon which Emery held it had been declared in writing, it would have come within the case of *Stone* v. *Hackett*, 12 Gray, 227. Although not declared in writing, parol evidence would be admissible to establish the fact that the assignment to Emery, while absolute in its terms, was in reality upon certain trusts or agreements, which, if proved, a court of equity might compel him to execute. *Newton* v. *Fay*, 10 Allen, 505. *Hunnewell* v. *Lane*, 11 Met. 163. *Campbell* v. *Dearborn*, 109 Mass. 130. 1 Perry on Trusts, §§ 85, 86, 226.

In *Stone* v. *Hackett*, the income of the property assigned was to be paid to the donor during life, and upon his decease the principal was to be divided among various charities, with a power reserved in the donor to modify or revoke the trust; and the validity of the trust was upheld. In the case at bar, there was no power to revoke, but the donor was entitled by the agreement to such portion of the fund as she required during her life. Such a provision, like a power of revocation, is not inconsistent with the creation of a valid trust. Trusts may be created by will or *inter vivos*, with power in the trustee to pay, and a right in the *cestui que trust* to receive, not merely the income, but the principal of the fund, as needed or called for. It is true, all the fund may be drawn out, leaving no balance to satisfy the gift over; but that cannot affect the legal title to the property in the hands of the trustee, and, if any surplus remains, the party designated should receive it.

It does not appear, upon the case stated, that it was the intent of Mrs. Ney to make a disposition of this property in its nature testamentary. *Stone* v. *Hackett*, *ubi supra*. There is no imputation of fraud or collusion between the parties; and it is immaterial that the son was not informed of the transaction until after his mother's death.

The claim of the appellant, that the balance paid to the son by Emery should have been credited in the son's account as executor of his mother's will, cannot, in the opinion of a majority of the court, be sustained; and the entry must be

Decree of Probate Court affirmed.

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WILLIAM L. G. PIERCE, administrator, *vs.* BOSTON FIVE CENTS SAVINGS BANK.

Suffolk. November 14. — 15, 1878. COLT & MORTON, JJ., absent.

In an action at law, brought against a savings bank in the name of the administrator of a depositor, and stated in the declaration to be brought for the benefit of one claiming the deposit by gift of the intestate, such administrator cannot be made a defendant under the St. of 1876, *c.* 203, § 19.

CONTRACT to recover deposits amounting to $600, and $15 interest, in a savings bank. The writ and declaration described the action as brought by William L. G. Pierce as administrator of the estate of William Green, Jr., for the benefit of Martin A. Munroe, to whom, as the declaration alleged, Green, "being then in his last illness, and aware that he might not recover, gave and delivered his pass book, evidencing the deposits in said bank, as an absolute gift, meaning and intending to assign and transfer his pass book to said Munroe, and to give him the absolute ownership and right of possession of said deposits and interest."

The bank, in its answer, admitted the deposits; averred its readiness to pay the same and interest to whoever was legally entitled thereto, and its ignorance whether Pierce had been duly appointed administrator of Green's estate; denied generally all the other allegations of the declaration, and especially those as to the title of Munroe; and alleged "that the legal representatives of said Green's estate claim said deposits and interest as a part of the effects of said estate, and that no part thereof belongs to said Munroe, and the defendant has been notified not to pay said deposits or interest, or any part thereof, to said Munroe."

Upon the petition of the bank, the Superior Court ordered Pierce, as administrator of Green's estate, to be made a party defendant under the provisions of the St. of 1876, *c.* 203, § 19, relating to savings banks, which is copied in the margin; * and

* "In all actions against any such corporation for money on deposit therewith, if it shall appear that the same fund is claimed by any other party than the plaintiff in such action, whether husband or wife of such plaintiff, or oth-

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he thereupon filed an answer "as claimant for benefit of Green's estate," denying that Green gave the bank book and deposits to Munroe as a *donatio causâ mortis*, as set forth in the declaration, and alleging that, if the bank book was so given, the gift rendered Green's estate insolvent, and was void.

At the trial before *Colburn*, J., and a jury, the pass book was in evidence, on the outside of which was the direction, "If you lose this book, give immediate information to the treasurer;" and inside, among the printed by-laws of the bank, the following: "It shall be the duty of the treasurer to enter all deposits, and payments made to depositors, in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher and the evidence of the amount deposited." "No person shall receive any part of his principal or interest, without producing the original book."

It appeared that the pass book had not been assigned by Green; and that his estate, including the said deposit of $615, consisted of $1237.50, and the funeral and other expenses did not exceed $174, and the debts did not exceed $26, unless the alleged donee, Munroe, should be considered as a creditor. Munroe testified that he had a legal claim against Green's estate, of $876, for board furnished and some expenses paid for Green; that he had never made any claim for it, but had consulted his counsel about it. Pierce was appointed administrator of Green's estate January 26, 1877, and the trial of this cause in the Superior Court was commenced January 18, 1878.

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erwise, the court in which such action is pending may, on the petition of such corporation and on such notice as it considers proper to the plaintiff and such claimants, order the proceedings to be amended by making such claimants parties defendant thereto; and thereupon the rights and interests of the several parties to the said action, in and to said funds, shall be heard and determined.

"The deposits which are the subject of said action may remain with such corporation until final judgment in the action, and shall be paid in accordance with the order of the court; or the said deposit may be paid into court to await final judgment in the action, and when so paid into court the corporation shall be stricken out as a party to such action and its liability for such deposit shall cease. The taxable costs of the corporation in the actions herein named shall in all cases be in the discretion of the court, and may be charged upon the fund affected by such action, but in no case to the bank."

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The defendant and the claimant requested the presiding judge to order a verdict for them, for these reasons: "1. That the delivery of the bank book to the plaintiff by the deceased in his last sickness, even if made when he did not expect to recover, and if intended by the deceased as a *donatio causâ mortis*, did not pass to the plaintiff any right to the deposit in the bank. 2. That it appearing from the testimony in the case that the only property left by the deceased, including the bank deposit, $615, amounted to $1237.50, and that the deceased, at the time of the alleged gift, owed the plaintiff $876, in addition to debts to other parties, and that the deceased was insolvent at the time of the alleged gift and of his death, the gift of the bank deposit, if good in other respects as *donatio causâ mortis*, is void, because made in fraud of creditors."

The judge declined so to rule; and instructed the jury that the ownership of the deposit would pass by the gift of the book, if they found that the gift was made as alleged, and that Munroe's claim for board and expenses did not render the gift to him void, if made in due form. At the request of the defendant and the claimant, the judge further instructed the jury that they might take into consideration, as bearing on the probability of the gift having been made, the question whether the estate was or was not insolvent, and of Green's knowledge of its condition.

The jury returned a verdict for the plaintiff; and to the above instructions and refusals to rule the defendant and the claimant alleged exceptions.

C. F. Kittredge, for the defendant and the claimant.

F. Ames, for the plaintiff.

GRAY, C. J. The right of action of a depositor against a savings bank is not negotiable at law, and an action against the bank to recover the amount of the deposit can only be brought in the name of the depositor, or, in case of his death, in the name of his administrator. Any one to whom the right has been transferred by a valid gift or assignment is entitled indeed to use the name of the depositor or of his administrator for the purpose of bringing an action against the bank. But the plaintiff and the only plaintiff of record is the person in whose name the action is and must be brought. *Foss* v. *Lowell Savings Bank*, 111 Mass. 285.

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It is only "any other party than the plaintiff in such action," that the St. of 1876, *c.* 203, § 19, authorizes to be summoned in as a party defendant. It is inconsistent alike with the terms of this statute, and with the rules of the common law, to make the plaintiff himself a defendant also. *Winthrop* v. *Minot*, 9 Cush. 405. If the action had been actually brought by, as well as in the name of, the administrator, and Munroe, as a claimant of the fund, had been made a party defendant under the statute, this difficulty might have been avoided, and issue might have been joined and tried upon the question whether the title in the fund was in the administrator or in the claimant.

The proceedings contemplated by the St. of 1876 are analogous to those upon a trustee process, where a third person is admitted as a claimant, under an assignment or otherwise, of the fund in the hands of the supposed trustee, although the claimant's interest is merely equitable and he could not have maintained an action at law in his own name against the trustee. Gen. Sts. *c.* 142, § 15. *Dennis* v. *Twitchell*, 10 Met. 180. *Kingman* v. *Perkins*, 105 Mass. 111. But it was never heard of that the plaintiff of record in a trustee process should be admitted as a claimant to defeat the right of recovery in an action brought in his own name.

In the present case, the proceedings were unauthorized by law, and were wholly irregular. The plaintiff of record was improperly made a defendant, and there has been a mistrial. The issue tried was not between the administrator, the only legal plaintiff of record, and the bank, the only legal defendant of record; but between the plaintiff, as a defendant, and a third person, not a legal party to the record at all, as plaintiff.

Verdict set aside, and notice to the plaintiff as claimant quashed.

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SUPPLEMENT.

THE Honorable BENJAMIN FRANKLIN THOMAS, a justice of this court from the twenty-eighth day of January, 1853, to the first day of January, 1859, died at his summer residence in Beverly on the twenty-seventh day of September, 1878. A meeting of the members of the bar of Suffolk County was held in Boston on the fifth day of October following, at which resolutions were passed, which were presented by the Attorney General to the full court on the seventeenth. Before presenting them, the Attorney General addressed the court as follows:

May it please your Honors, — The Honorable Benjamin Franklin Thomas, formerly one of the justices of this court, died at Beverly on the twenty-seventh day of September last. He died suddenly, but surrounded by his family and friends, realizing the Spanish benediction which he so much admired, "May you die among your kindred."

Born in Boston on the thirteenth day of February, 1813, he entered the freshman class in Brown University in 1826, being a little more than thirteen years of age. His classmate and friend, the Honorable Ellis Ames, of Canton, in a brief note addressed to me a few days since, thus writes of him: "On my entering college, at the commencement of the sophomore year in 1827, my principal attraction was to my classmate, Benjamin F. Thomas, then fourteen years old the February preceding. More than three years younger than myself, I looked upon him as a mere boy. How handsome he was, with bright eyes, plump cheeks, and overflowing with vivacity! He was a good scholar in every department of study, punctual and faithful in the performance of every duty required of him as a college student, and exemplary in his moral character. In due time we found that in intellectual power he was no boy. In reciting from Homer

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in the original Greek, he was not only critical in literal construction and in applying the rules of grammar, but he read the whole of the Iliad in English as a great epic poem, viewed the relation of parts to the whole, distinguishing the brilliant passages, and taking great delight in repeating them from memory. Our class, during the junior and senior years, made their recitations both forenoon and afternoon to Dr. Wayland, then in the height of his zeal as a teacher, himself only thirty-three and thirty-four years of age. No book was allowed to be carried into the recitation room. Our subjects were Moral Philosophy, Rhetoric, Criticism, Political Economy and Intellectual Philosophy. In all these subjects Thomas was well versed. I remember his discussions on points in Intellectual Philosophy with Dr. Wayland, which proved him, as we of his classmates thought, to be possessed of extraordinary intellectual powers." I have quoted these words from a loving and honest classmate, because they best give us the characteristics of the boyhood and youth of Judge Thomas. How well in after years he redeemed the promises of his youth, I need not repeat in this presence.

With his merits as a lawyer, a judge and a statesman, we are all familiar; and very high rank has been accorded to him by those the best qualified to judge. His acquaintance for many years, and, for the last eighteen years of his life, enjoying his friendship, I prefer to dwell on his personal gifts and qualities. His heart went out to every kindly sentiment and every humane influence. That class of persons in our community (happily so large) who devote themselves to the ministrations of our holy religion, not only as the ministers of the gospel of Christ, but as laymen in the administration of beneficent charities, unknown to the outside world, constantly sought of him that aid and advice which his experience as a lawyer and a judge, and his knowledge of affairs, rendered of infinite value, and they never sought his aid in vain. He found his compensation in the benedictions of the poor and the distressed, the widow and the fatherless, who have lost in him a benefactor whom they alone could appreciate.

To the young members of the profession, he was a kind adviser and sympathetic friend; and many a young lawyer, upon presenting to the court his first brief and argument, has been

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restored to consciousness and self-possession by the kindly attentions of Judge Thomas, when disconcerted by the more abrupt manners of a no less kindly, but less thoughtful, associate. He loved his profession as one of the highest and noblest in its purposes and achievements; and every worthy member of it was to him a brother. He was steadfast in every movement for its elevation, exerting to that end all his influence, both in public and in private. As president of the Bar Association, in the success of which he was deeply interested, he never failed to attend its meetings, and no one who was present at the dinner of the association in January last will ever forget the felicitous address with which he opened the intellectual exercises of the occasion, and the entire abandonment to enjoyment with which he threw himself into its festivities.

He was such an advocate as is described by Lord Chancellor Campbell in his memoir of Erskine, — an advocate inspired by a generous love of fame, and desirous of honorably assisting in the administration of justice by obtaining redress for the injured and defending the innocent; one who has studied liberally the science of jurisprudence, and stored his mind and refined his taste by a generous acquaintance with elegant literature; one who had an intuitive insight into human character, and into the workings of human passion; one who was able, by his power of persuasion, to give the best chances of success to every client whom he represented in every variety of public causes; and one who, by the victories which he gained and the principles which he established, has helped to place the free constitution of his countrymen on an imperishable basis.

If the court please, I am requested by my brethren of the bar to present the following resolutions to the court, and to ask that they may be entered on its records as an enduring testimonial to his merits by those who knew him best.

The Attorney General then presented the following resolutions:

Resolved, That the members of the Bar of Suffolk County desire to record their sense of the great loss which the legal profession and the people of the Commonwealth have sustained in the death of Benjamin Franklin Thomas, formerly Associate

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Justice of the Supreme Judicial Court; a wise counsellor, an eloquent advocate, a patriotic citizen, an upright man. As a judge, he was remarkable for his sound learning, vigorous intellect, strict impartiality, and for his uniform courtesy and kindness to all. As an advocate, his efforts were characterized by clearness of statement, methodical arrangement, logical reasoning and fervid eloquence. His public career illustrated his love of country, his devotion to duty, and his personal independence. The purity of his life, his nice sense of honor, the warmth and steadfastness of his affections, endeared him to all who enjoyed the privilege of his friendship.

Resolved, That we ask that these resolutions be presented by the Attorney General to the Supreme Judicial Court, with the respectful request that they may be entered on its records as an enduring testimonial to the merits of the deceased by those who knew him best.

Resolved, That we deeply sympathize with the family of our departed brother, and that a copy of these resolutions be transmitted to them by the chairman and secretary.

CHIEF JUSTICE GRAY responded as follows:

Brethren of the Bar: The court heartily concurs in your testimony of respect and affection to the late Judge Thomas.

When comparatively a young man, he was conspicuous in the front rank of a very able bar; before he was forty years old, he was appointed, with the general approval of the profession and of the public, to a seat upon this bench, where, in a service of less than six years, he gained a lasting judicial fame, such as has hardly ever been acquired in so short a time; and for the twenty years since his resignation he has been known and honored as one of the first lawyers and best citizens of the Commonwealth.

Warm-hearted, sincere, courageous, independent, high-minded and public-spirited; remarkable, throughout his career at the bar, alike for the enthusiasm with which he threw himself into a cause, and for his prudent and thorough preparation of it; he was a beloved leader, and a valued and trusted colleague. He looked upon precedents not as masters, but as aids, and hesitated to follow them, unless satisfied that they were founded in principle. He was an ardent student of the history of constitutional

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law and government in England and America. He had that characteristic of the greatest lawyers of both countries, an inborn love of freedom and of justice, and a profound conviction that freedom is best assured, and justice best attained, by having both sides of every question fully and fairly argued. In the discharge of every public trust, and in the performance of every professional duty, he acted upon the motto of Selden, Περὶ παντὸς τὴν ἐλευθερίαν — "Above all things, liberty."

In private life, he was domestic, companionable, hospitable, generous. He partook of the opinion of Bacon, that a garden is the purest of human pleasures, and the greatest refreshment to the spirits of man. As often as he changed his dwelling-place from one part of the State to another, he thought it essential to the completeness and comfort of his home to plant and cultivate an orchard, in which he might gather recreation for himself and gifts for his friends. Few professional men in active practice have been greater readers of poetry and philosophy. He was a special admirer of the lofty sentiments and majestic rhythm of Milton. He was familiar with the chief works of the foremost thinkers of our own time. But no subtlety of logic, no brilliancy of theory, could shake his hold upon that hope which is as an anchor of the soul, both sure and steadfast, and which entereth into that within the vail.

In accordance with the request of the bar, their resolutions, together with a memorandum of these proceedings, will be entered upon the records of the court.

The court then adjourned.

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ACTION.

1. A person may maintain an action against two or more persons, who, by concert of action, fraudulently induce him to leave his home in another state and come into this Commonwealth, with intent to cause his arrest and compel him to settle a disputed claim; and it is no bar to the action that, after his arrest, he submitted himself to the jurisdiction of the court without pleading the illegality of his arrest in abatement. *Cook* v. *Brown*, 503.

2. The owner of land, who makes a contract with a firm of masons, by which the latter are to furnish all the materials and labor in building a party wall, half on his land and half on the land of an adjoining owner, is liable in tort to such adjoining owner, after the wall has been completed and accepted, for an injury to his property by the fall of the wall, resulting from its defective and unsafe condition, whether owing to his own negligence or to that of the masons. *Gorham* v. *Gross*, 232.

3. In an action of tort against a religious society, and against A. and B., its agents, for personal injuries occasioned to the plaintiff by the fall of a staging, upon which he was standing while engaged in painting the ceiling of a church belonging to the society, it appeared that A. and B., acting as a committee and as the authorized agents of the society, made a contract with C., in whose employ the plaintiff was, to paint the whole of the inside of the church building for a gross sum, and not subject to the direction or control of the defendants, except as to the quality of the work and the time within which it was to be performed; that the society undertook to erect and remove the staging to be used by C., and, acting through the same agents, employed D., a carpenter and builder of their own selection, by a contract for a gross sum, and not subject to the direction or control of the defendants, to erect and remove the staging and to supply all the material

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and labor required for that purpose; and that C. did not and could not know, from the appearance or from examination of the staging, whether it was or was not strong enough for his workmen to go upon to paint the church. There was no evidence that the defendants took any part in erecting the staging, or in directing its erection, beyond making the contract with D.; or that they at any time made any inspection of the staging; or that they were guilty of any negligence in employing D. to erect it. *Held*, that the society, through its authorized agents, had accepted and used the staging, and had in effect invited and induced C. and his workmen to come upon it to paint the church, and was liable to the plaintiff for an injury from the dangerous condition of the staging which was not apparent to him and which was caused by negligence in its construction. *Held, also*, that the society and its agents could not be sued jointly in this action. *Mulchey* v. *Methodist Religious Society*, 487.

4. After judgment for the conversion of certain chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, although the plaintiff was prevented from including them in the former action by the fraudulent acts of the defendant. *McCaffrey* v. *Carter*, 330.
5. If a person falls from a platform twenty feet to the ground, becomes unconscious on striking the ground, and remains so until his death, damages cannot, in an action against the person who was bound to keep the platform in repair, and through whose neglect in so doing the accident happened, be recovered for the mental or other suffering endured during the fall. *Kennedy* v. *Standard Sugar Refinery*, 90.
6. An action for personal injuries caused by falling a distance of forty feet, and resulting in instant death on reaching the ground, cannot be maintained. *Moran* v. *Hollings*, 93.
7. An action of tort in the nature of deceit cannot be maintained against an officer, who, at a sale of land on execution, in good faith makes a statement, as of his own knowledge, that the land is free from incumbrances, when it is in fact incumbered. *Tucker* v. *White*, 344.
8. A grantee cannot maintain an action of contract upon an oral statement made by his grantor, before delivery of the deed, that the land is free from incumbrances. *Ib.*
9. An agreement to forbear, for a certain time, to enforce the performance of a contract complete in itself cannot be pleaded in bar to an action upon the contract. *Rodocanachi* v. *Buttrick*, 134.

See Assessor; Bankrupt, 3; Bond, 3; Conflict of Laws, 2; Contract, 3, 5; Corporation, 2; Equity, 10; Interest; Joint Debtor; Pleading, 2; Promissory Note, 1, 3, 4; Railroad, 1, 7; Ship, 2; Surveyor of Highways, 1; Trust and Trustee, 1.

ADMINISTRATOR.

See Executor and Administrator.

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ADMISSION.

See EVIDENCE, 14.

ADULTERATION.

See INDICTMENT, 1.

ADULTERY.

See EVIDENCE, 16.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALABAMA CLAIMS.

See BANKRUPT, 4, 6; INSOLVENT DEBTOR.

ALIEN.

See PAUPER, 1.

ALTERATION OF INSTRUMENTS.

See PROMISSORY NOTE, 1, 2.

AMENDMENT.

See PARTNERSHIP; PRINCIPAL AND SURETY, 1; TRUST AND TRUSTEE, 1, TRUSTEE PROCESS.

ANSWER.

See PLEADING, III.

APPEAL.

An appeal from the judgment of a magistrate upon charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, by which the debtor is adjudged guilty of some of the specifications in the charges and not guilty of others, vacates the whole judgment, and opens the case for trial upon all the charges, although the other party does not appeal. *Morse* v. *Dayton*, 47.

See EQUITY, 11; INTERROGATORIES, 2; NUISANCE, 1.

APPRAISER.

See EXECUTION.

AQUEDUCT.

See DAMAGES, 3.

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ARRAIGNMENT.

See CONVICTION.

ARREST.

See ACTION, 1; OFFICER, 1, 2.

ASSAULT AND BATTERY.

An indictment charging that A. "in and upon one B., with a certain dangerous weapon, to wit, with a pistol then and there loaded with powder and a leaden ball, with which dangerous weapon the said A. was then and there armed, feloniously, wilfully and of his malice aforethought did make an assault, with intent the said B. then and there, with the pistol aforesaid, feloniously, wilfully and of his malice aforethought to kill and murder," sufficiently sets forth an assault with a dangerous weapon; and is sustained by proof of an assault by shooting with the pistol. *Commonwealth* v. *Fenno*, 387.

See OFFICER, 1.

ASSESSMENT.

See SEWER, 2.

ASSESSOR.

Assessors are liable, in an action of tort, for assessing and issuing a warrant for the collection of a school-district tax, if the school district was not legally established, although it was certified to them, by one acting as clerk of the district, that the tax had been voted by the district. *Judd* v. *Thompson*, 553.

ASSIGNEE IN BANKRUPTCY.

See BANKRUPT, 1, 3, 4, 6.

ASSIGNMENT.

1. Future wages, to be earned under an engagement not existing at the time, are not capable of being assigned. *Herbert* v. *Bronson*, 475.
2. In an action on an account annexed for work and labor, brought in the name of A. for the benefit of C., there was evidence that A., who was in the employ of B. by the day, assigned to C. all claims against B. for money due and to become due "for services rendered and to be rendered" for a certain time; that the consideration of this assignment was goods already furnished and to be furnished by C. to A.; that, before the time limited by the assignment expired, A. left the employ of B., and entered the employ of D., under an arrangement by which A. was to continue to work on B.'s premises at the same wages, to be paid by B. to D., and by the latter to A., partly in cash and partly in goods. *Held*, that A.'s employment by B. being by the day, he had the right at any time to find employment elsewhere; and that none of A.'s wages, after he ceased to work for B., passed by the assign-

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ment to C. although the arrangement between A., B. and D. was made with the intent to terminate the employment of A. by B., and deprive C. of the benefit of the assignment. *Lightbody* v. *Smith*, 51.

See BANKRUPT, 4, 5; EQUITY, 6; LEASE, 1, 2; OFFICER, 3.

ASSUMPSIT.

See CONTRACT.

ATTACHMENT.

See BOND, 3; CONTRACT, 4, 5; EQUITY, 3, 7; JUDGMENT, 2, 3; OFFICER, 3; PARTNERSHIP; PRINCIPAL AND SURETY; TRUST AND TRUSTEE, 5, 6.

ATTORNEY AND COUNSEL.

See INTERROGATORIES, 1; PAYMENT, 3.

AUDITOR.

It is no ground of objection to the report of an auditor, that, for the purpose of determining the issues submitted to him, he construes a contract, the construction of which is involved in such determination. *Coker* v. *Ropes*, 577.

See STATUTE.

BAILMENT.

See CARRIER; EVIDENCE, 9.

BANK.

1. A national bank which purchases a promissory note from an indorsee may maintain an action thereon in its own name against a prior party thereto, without regard to the question whether the purchase was one which it was authorized by law to make. *National Pemberton Bank* v. *Porter*, 333.
2. In an action for money had and received, to which the answer was a general denial, it appeared that the defendants, a firm of brokers, sent to the plaintiff, a national bank, certain promissory notes, ordered by its president and a director, for the amount of which its cashier returned a check to them; and the question was whether the plaintiff purchased the notes or had the option to buy them or not, as its board of directors should decide. The directors refused to purchase the notes. The defendants offered to prove that national banks bought commercial paper, which their presidents were authorized by usage to purchase, and requested the judge to rule that, even if the plaintiff had such option, the action of its cashier completed the sale. The judge rejected the evidence, refused so to rule, and, by consent of parties, before verdict, reported the case to this court, upon an agreement that if the plaintiff could not lawfully buy the notes and the evidence was rightly rejected and the rulings refused, a verdict should be entered for the plaintiff. *Held*, that the question whether a national bank had authority to purchase promissory notes did not arise in the case; and

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that the question as to the contract between the parties was for the jury. *Attleborough National Bank* v. *Rogers*, 339.

BANKRUPT.

1. An assignee in bankruptcy has no better title than the bankrupt, except in goods conveyed in fraud of creditors. *Dugan* v. *Nichols*, 43.
2. Under the U. S. Rev. Sts. § 5013, the four months next preceding the commencement of proceedings in bankruptcy, an attachment made within which is dissolved by § 5044, are to be reckoned exclusive of the first day, and, if the last day falls on Sunday, exclusive of that also. *Cooley* v. *Cook*, 406.
3. An assignee in bankruptcy, after demand and refusal, may maintain an action of tort, in the nature of trover, against an officer holding goods of the bankrupt under an attachment on mesne process which has been dissolved by the assignment in bankruptcy, without first applying to the court from which the process issued for an order to deliver the goods to him. *Ib.*
4. Money paid by the United States, according to a decision of the Court of Commissioners of Alabama Claims, under the U. S. St. of June 23, 1874, to the owner of a cargo destroyed by one of the insurgent cruisers, with respect to which it was determined by the Tribunal of Arbitration at Geneva, constituted by virtue of the Treaty of Washington of 1871, that Great Britain had failed to fulfil her duties as a neutral government, belongs to an assignee of such owner, appointed under the bankrupt act of 1867, after the destruction of the property and before the making of the treaty; and may be recovered from the owner by the assignee in an action for money had and received. *Leonard* v. *Nye*, 455.
5. The U. S. St. of February 26, 1853, requiring assignments of any claim upon the United States to be executed in the presence of two witnesses, and after the allowance of the claim, the ascertainment of the amount due, and the issue of a warrant for its payment, applies only to voluntary assignments *in pais*, and not to assignments by operation of law in bankruptcy proceedings. *Ib.*
6. A sale by an assignee in bankruptcy, under order of the court, of "certain choses in action, consisting of certain bills, notes and accounts, nominally of the value of about $1000, but in reality nearly worthless," does not include the right of the assignee in money afterwards awarded to the bankrupt by the Court of Commissioners of Alabama Claims for the previous destruction of his property by an insurgent cruiser. *Ib.*
7. Under the U. S. St. of June 22, 1874, § 12, knowledge on the part of a purchaser, that the sale was in fraud of the seller's other creditors, is necessary to set aside the sale as to him. *Lincoln* v. *Wilbur*, 249.
8. On the issue whether a sale made by a person within four months of his bankruptcy was in fraud of his creditors, evidence of what he said, after the sale, and without the knowledge of the purchaser, as to the disposition of his property, and mortgages subsequently made by him, not shown to be connected with such sale or parts of a general scheme to defraud, are inadmissible, as against the purchaser. *Ib.*

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9. On the issue whether a sale was in fraud of the creditors of a person, who within four months thereafter was adjudged a bankrupt, the purchaser may be asked by his counsel if he knew at the time of the sale that the seller had a fraudulent purpose to make a preference, or was contemplating bankruptcy. *Lincoln* v. *Wilbur*, 249.

10. A creditor, who has filed charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors from the judgment of the magistrate on which charges the debtor has appealed, is not barred from prosecuting the charges by proving his claim against the debtor in bankruptcy, pending the hearing before the magistrate and before the charges are filed. *Morse* v. *Dayton*, 47.

11. On the issue whether the conversion of personal property was fraudulent, so that an action therefor would not be barred by a discharge in bankruptcy of the defendant, the burden of proving the fraud is on the plaintiff throughout the case; and an instruction that, if the defendant did any acts in relation to the property which were unlawful, the burden was on him to prove that he acted honestly, is erroneous. *Burnham* v. *Noyes*, 85.

See Fraudulent Conveyance, 2; Insolvent Debtor; Pleading, 1; Replevin, 3.

BAR.

See Action, 9; Corporation, 2; Promissory Note, 3.

BOARD OF HEALTH.

See Nuisance.

BOND.

1. In an action against the principals and a surety on a bond, executed in the name of a firm by one of two partners named as principals, and by the surety, the default of the principals is an admission of the due execution of the bond by the firm, which the surety cannot controvert. *Ahrend* v. *Odiorne*, 50.

2. If a person signs a bond as a party thereto, it is immaterial that he is not named in the bond. *Ib.*

3. It is no defence to an action on a bond given to dissolve an attachment, that the principal defendant, while the original action was pending, was, in a trustee process, adjudged trustee of the plaintiff, it appearing that the defendant paid nothing in consequence thereof, and that the plaintiff had recovered judgment against the defendant without regard to the amount for which the latter had been adjudged trustee. *Wood* v. *Mann*, 319.

4. Although the sureties on the bond of a town treasurer are not liable for any default on his part which occurred during a previous term of office, where the bond recites that he has been chosen for the current year, and contains the condition merely that he shall faithfully discharge the legal duties of his office, yet if the treasurer, at the beginning of the year for which

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the bond was given, reports a balance due from him for the preceding year, and subsequently charges himself with amounts collected by him during the year, and credits himself with money paid by him on account of the town, such credits, in an action against the sureties on the bond, may first be applied to the payment of the balance due at the beginning of the year, although the treasurer had, prior to that time, converted such money to his own use. *Egremont* v. *Benjamin*, 15.

5. In an action against the sureties on a bond given by a town treasurer for the faithful discharge of his official duties, it was admitted that there was a breach of the bond, and that execution should issue for a certain amount. The defendants contended that a certain other amount should not be included in the execution, because there had been no formal demand on the treasurer before bringing the action. It appeared that the town, at the expiration of the treasurer's term of office, appointed a committee to settle with him; that such committee made a report to the town, showing a certain balance due from the treasurer, which report was accepted; and that the treasurer turned over his official books and accounts and a sum of money to his successor. *Held*, that the unpaid balance in the hands of the officer was due immediately on the expiration of his term of office; and that no formal demand on the part of the town was necessary. *Ib.*

See JUDGMENT, 2, 3; MONEY HAD AND RECEIVED; PAYMENT, 2; PLEADING, 4; PRINCIPAL AND SURETY.

BROKER.

See EQUITY, 10; FRAUDULENT REPRESENTATION, 1.

BURDEN OF PROOF.

See BANKRUPT, 11.

CARRIER.

1. If goods are sent by a common carrier to be delivered to A., the carrier is not justified in delivering them at the store of B., although A. has guaranteed the rent of the store, and has been compelled to pay it. *Mahon* v. *Blake*, 477.

2. An allegation, that a common carrier agreed "to deliver to E. T. Learned" certain goods, is supported by evidence that the carrier clearly understood him to be the person for whom the goods were intended, although the name marked thereon was "E. D. Leonard." *Ib.*

See PLEADING, 3; RAILROAD, 4–6, 9, 10; SHIP.

CASE STATED.

A case stated, whereby it is agreed that judgment shall be for the plaintiff, if the action can be maintained in any form, "either at law or in equity," waives all questions of form and process. *Boxford Religious Society* v. *Harriman*, 321.

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CHARITY.

A testator by his will gave $1500 to a parish "to build and support a public school for the education of children as the law now directs, to be located as near a certain meeting-house as land could be purchased for a reasonable price. The parish, in 1864, voted to accept the gift, chose a committee of its members, of which A. was chairman, to receive it, and subsequently, without leave of court, voted, in 1865, to relinquish the trust fund to that school district within it nearest the meeting-house. The district, having accepted the fund, chose a committee of its inhabitants, of which A. was also chairman, to administer it. A. continued to hold the fund, his associates disclaiming any interest in it, as a trust fund. *Held*, in an action brought in 1875, that the gift was a public charity; that the parish might recover possession of such trust fund; and that the statute of limitations had not begun to run in A.'s favor. *Boxford Religious Society* v. *Harriman*, 321.

See Devise and Legacy, 3.

CHECK.

See Payment, 3.

CITY.

See Contract, 6; Evidence, 1–4; Exceptions, 14–17; Sewer; Town; Way, 1, 3, 4.

COMPLAINT.

See Intoxicating Liquors, 2, 3.

COMPROMISE.

See Contract, 5.

CONFESSION.

See Evidence, 14.

CONFLICT OF LAWS.

1. The validity of a contract, even as regards the capacity of the parties, is generally to be determined by the law of the state in which it is made. *Milliken* v. *Pratt*, 374.
2. A contract, made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts, although the contract was made by letter sent from her here to the other party there. *Ib.*

See Contract, 1, 2.

CONSIDERATION.

See Contract, 5; Damages, 1.

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CONSTITUTIONAL LAW.

See PAUPER, 2; TAX, 1; WAY, 1.

CONTRACT.

I. *Making.*

1. If an inhabitant of this Commonwealth buys goods personally in another state, or orders them by letter mailed here, and they are delivered to a carrier for him there, the contract is made in that state. *Milliken* v. *Pratt*, 374.
2. A contract of guaranty, signed in this Commonwealth and sent by mail to another state, and assented to and acted on there, for the price of goods sold there, is made in that state. *Ib.*
3. A corporation, to which A. had mortgaged a lot of land, sold it, under a power contained in the mortgage, to B., its treasurer, and conveyed the land to him by deed. B., in fact, held the title on a naked trust for the corporation. After this, the house on the land needing repairs, A., who did not know of the sale and supposed that he still held the equity of redemption, applied to the corporation to make an arrangement for the repairs, and was referred to B., and an agreement was made between A. and B. by which A. should make the repairs, and when so made the corporation should take a mortgage for a certain sum on the land, and, while the work was being done, the old mortgage should remain as it was. After the work was done by A., he discovered the fact of the sale under the mortgage. *Held*, that he could not maintain an action against B. for the cost of the work so done. *Meserve* v. *Bacon*, 499.

II. *Consideration.*

See CONTRACT, 5; DAMAGES, 1.

III. *Validity.*

4. A contract, by which a person is appointed keeper of attached property by the attaching officer, is not unlawful as between the parties to it; and, in an action by the keeper against the officer, for the value of services rendered under the contract, it is no defence that the officer has no claim against another for the performance of such services. *Stowe* v. *Buttrick*, 449.
5. An agreement that the fee of an officer for keeping property, attached upon a writ in an action brought by the plaintiff against the defendant, should not be included in the taxation of costs, in consideration of a promise by the defendant to pay the same to the plaintiff in a few days, is a lawful contract; and, it appearing that there was a controversy between the parties as to whether such fee was properly taxable as a part of the costs, and that the agreement and promise were made as an adjustment of the controversy, is founded upon a sufficient consideration; and, upon the neglect of the defendant to pay as agreed, the plaintiff may maintain an action against him for the amount of the fee, although the plaintiff, at the time the action was begun, had not paid the fee to the officer. *Clark* v. *Gamwell*, 428.

See CONFLICT OF LAWS, 1; INTOXICATING LIQUOR, 1.

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IV. *Construction.*

6. A. made an agreement in writing with a city, for a round sum, to provide all materials and perform all labor required in the erection of a public building upon a certain parcel of land, according to plans, drawings and accompanying mason's specifications, prepared by a certain architect, and such other drawings and detail explanations, as might be considered necessary for the progress and completion of the building, according to the true intent and meaning thereof. The agreement also provided that, in case any particulars should be deficient or not clearly shown by the plans or expressed in the specifications, A. should carry out the general design, as directed by a certain committee and the architect, in as thorough a manner as if the same were shown and fully expressed; that it should be lawful for the committee or architect to direct in writing any additions to or deviations from the plans and specifications, and in such case such sums of money should be added to, or deducted from, the agreed price, as the parties to the agreement should judge the increase or diminution to be worth; that no alterations or additions should be paid for unless so directed in writing. The specifications provided that A. should remove the earth from the area of the lot to be covered by the building, to the requisite length, breadth and depth for the basement, walls, foundations, &c.; that the exterior basement foundation walls should be constructed of large, flat, blue stone, to be faced upon both sides, and laid solid in and pointed on both sides with mortar; that the earth beneath the walls should be thoroughly tamped and puddled and the bottom course firmly bedded upon it; that all the basement walls should commence fourteen inches at least below the basement floor, and as much deeper as necessary, to guarantee a firm and solid foundation, the walls to be of the thickness and construction indicated by the drawings; that A. should do any and all other masonry necessary to fully finish and complete all parts of the building, according to the true intent and meaning of the plans, drawings and specifications, whether particularly therein described or not. The plans showed a section of the foundation walls fourteen inches below the basement floor and no more, and did not indicate any piles, nor were any mentioned in the specifications. In excavating for the foundations, the soil was found to be of such a character as to require, in the opinion of the architect, piles to be driven in order to secure a firm foundation for a part of the walls. The architect accordingly furnished piling plans, directed A. to do the work, and orally promised him that he should be paid for it. A. drove the piles, cut them off, placed coping stones on them, and rubble stones on the coping stones up to the line of the foundation walls, as shown in the plans. *Held*, in an action for the work and materials so done and furnished, that parol evidence that the plaintiff made his estimate for the cost of the work based on the plan showing a section which required a depth of only fourteen inches, and that other persons in the same business were accustomed to make estimates in the same manner, was incompetent; that the defendant was not bound by the oral promise of the architect that

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the work should be paid for; and that the action could not be maintained. *Stuart* v. *Cambridge*, 102.

See EVIDENCE, 4, 11.

V. *Rescinding.*

See INSURANCE, 1.

VI. *Performance and Breach.*

See ACTION, 9; EQUITY, 4.

CONVICTION.

If a person, on arraignment, refuses to plead, and stands mute, he is, by the Gen. Sts. *c.* 171, § 29, to be tried as if he had pleaded not guilty; and, having been so tried, and been convicted, and having appealed, the want of a formal entry of such a plea upon the record transmitted to the appellate court is no error; and a statement by the clerk to the jury, when the defendant is put upon his trial in that court, that he had pleaded not guilty in the court below, is at the most an informality which is waived by going to trial without objection. *Commonwealth* v. *McKenna*, 397.

See VERDICT, 2.

CORPORATION.

1. If a corporation issues a certificate of stock to A. as trustee, and has notice of the name of the *cestui que trust*, and, on A.'s wrongfully transferring the certificate, issues a new certificate without making any inquiry, it is liable to the rightful owner, if he is injured thereby, without proof of fraud or collusion between the corporation and the trustee. *Loring* v. *Salisbury Mills*, 138.

2. If a corporation issues stock to A. as trustee, and, with knowledge of the name of the *cestui que trust*, issues a new certificate to one to whom the trustee has, in violation of the trust, transferred the stock, it is no bar to an action against it for the wrong done to the *cestui que trust*, that part satisfaction has been received from the trustee. *Ib.*

See BANK; EQUITY, 8; LEASE, 3, 4; TAX, 3.

COSTS.

See CONTRACT, 5; EQUITY, 11; JUDGMENT, 2, 3; PLEADING, 4; STATUTE.

COURTS.

See DISTRICT COURT; REMOVAL OF ACTION; REPORT; SHIP, 2.

COVENANT.

See ESTOPPEL.

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DAMAGES.

1. In an action upon a *quantum meruit* for services rendered to another upon his express request, the compensation is to be determined by the value of the services, and not by the amount of benefit which the person requesting them receives. *Stowe* v. *Buttrick*, 449.

2. In an action by a mortgagee for the conversion of personal property, attached by the defendant, on a writ against the mortgagor, in whose possession the property was, the defendant is not entitled to have the fact that, after the expiration of the ten days limited by the Gen. Sts. *c.* 123, § 63, the property was returned to the mortgagor, considered in mitigation of damages. *Robinson* v. *Sprague*, 582.

3. A statute gave an aqueduct corporation power to take land, and provided that the damages should be assessed according to the law applicable in case of land taken for public highways. A subsequent statute, giving the corporation power to take additional land, provided that, on a petition to a court for the assessment of damages for land so taken, "the cause shall thereupon proceed like other civil causes in said court." *Held*, that, in the case of land taken under the latter statute, the same rules should govern, in the assessment of damages, as applied to an assessment under the former statute. *Chandler* v. *Jamaica Pond Aqueduct*, 544.

4. Possession of land for many years, under a claim of title in fee, is sufficient to maintain a petition for the assessment of damages sustained by reason of the taking of the land by a corporation under the authority conferred by statute; and evidence that the petitioner had a base fee only in part of the land is inadmissible in reduction of his damages. *Ib.*

5. Under a statute giving the right to take land, and providing for a jury to assess the damages sustained by any person whose land is taken or injured, damages are to be assessed for the injury resulting to the adjoining land of a petitioner, although the petition sets forth only the taking of a described parcel of land, and prays for a jury to assess the damages caused by such taking. *Ib.*

6. On a petition for the assessment of damages for the taking of land, the jury may properly consider, in estimating its value, the purposes for which it may be used. *Ib.*

7. On a petition for damages for land taken by a corporation under authority conferred by statute, interest on the amount awarded is to be assessed from the time of the taking. *Ib.*

See Action, 5; Evidence, 1, 3, 5–7; Exceptions, 12, 14–17; Fraudulent Representation, 2; Railroad, 1–3; Replevin, 2; Way, 2–6.

DEATH.

See Action, 5, 6; Equity, 10.

DECEIT.

See Action, 7.

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DEED.

See ACTION, 8; EASEMENT; ESTOPPEL; MORTGAGE, 1.

DEFAULT.

See BOND, 1.

DEMAND.

See BOND, 5; MORTGAGE, 3, 4.

DEMURRER.

See PLEADING, 4.

DEVISE AND LEGACY.

1. This clause in a will, "I order that $500 per year for ten years be paid over to" A. in equal quarterly payments, gives A. an annuity contingent on his living so long, and not a legacy of $5000, payable in instalments. *Bates* v. *Barry*, 83.
2. Under a will containing the following clause: "All the rest, residue and remainder of my estate, real, personal or mixed, of whatever name or nature, I devise and bequeath to A. for his comfort, support and maintenance during his natural life, and at the decease of A., whatever of said estate remains unexpended by him, then I give and bequeath the same to B.," A. takes an estate for life, with a power to sell and convey in fee, if necessary for his support and maintenance; and the remainder over is contingent on its not becoming necessary to exercise that power. *Johnson* v. *Battelle*, 453.
3. The will, dated January 7, 1862, of a citizen of this Commonwealth, contained the following clause: "Wishing to contribute my mite towards suppressing the rebellion and restoring the Union, I give and devise the rest and residue of my estate to the United States of America." The residue consisted of land in this and in another state, and of personal property; and the executors, acting for the benefit of the estate and by the consent of all parties in interest, had managed and received the rents of all such land. *Held*, on a bill in equity by the executors to obtain the instructions of the court, that the devise and bequest was absolute, and that the fact that the rebellion had been suppressed before the death of the testator was immaterial; that there being nothing in the law of this Commonwealth to prevent the United States from taking by devise, it could so take; and that, in the absence of evidence, the law of the other state was to be presumed to be the same as our own. *Dickson* v. *United States*, 311.
4. A testator, by his will, after giving certain real estate to his widow in fee, with all his furniture, and a certain sum in trust for the support of a deceased son's wife and children, devised the residue of his estate in trust to support his widow out of the income during her life, to pay a certain annuity to his son and daughter "during the continuance of this trust," to add the surplus income to the residue, to permit his deceased son's widow to

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occupy a certain dwelling-house free of rent during her widowhood, and, "as soon as may be after the decease of my said wife, my said trustees or their successors shall convey, transfer or pay to my son and daughter, in equal shares, all the estate here given in trust, if they both survive my said wife, subject to the right of the widow of my said son, deceased, to occupy as aforesaid said tenement in my said house during her widowhood. In case either of them should die in the lifetime of my said wife, leaving no issue, the said estate given in trust shall be transferred or conveyed to the survivor, subject to the same right of my said son's widow." The son survived the widow, and the daughter, who was married after the death of the testator, died before her, leaving a son and a husband, who was appointed her administrator. *Held*, that the testator's son and daughter each took a vested equitable remainder in the residue, expectant on the termination of the widow's life estate, and liable to be divested only by the death of either of them in the widow's lifetime without leaving issue; that the son was entitled to one half of the residue, and the daughter's administrator to the other half; and that the daughter's annuity ceased with her death, her administrator being entitled to the proportional part thereof for the time between the last payment to her and her death. *Weston* v. *Weston*, 268.

5. A testator, by his will, devised his estate to his wife for life or during widowhood, and, if she married again, or at her death, to his "heirs at law;" bequeathed small legacies to his children, who were his heirs at law, "in addition to their equal shares of my real and personal estate to which they may be entitled" after the termination of their mother's interest; and gave the residue of his estate, after such termination, to his children, "to be divided in equal shares between them, to have and to hold the same to them, my said children, their heirs and assigns forever; and my said wife shall never, by the law of descent, become the heir to any or either of my children; and if it should so happen that any child of mine, holding property, should decease during the lifetime of its mother, the property thus left by such deceased child shall become, belong to and be received by the other surviving children or child." *Held*, that the clause as to the inheritance of the testator's wife from his children, and as to the property of any child, dying during its mother's lifetime, going to the survivor or survivors, was inoperative and void; that the testator's children took vested remainders subject to his wife's life estate, the children of a deceased child taking by right of representation, and that the testator's wife inherited her proportionate share of the estate of a child who died intestate and without issue during her widowhood. *Hill* v. *Downes*, 509.

6. A testator, by his will, devised the residue of his estate to trustees, in trust to pay the income to his son for life, and, on his death without issue, to be divided among his nephews and nieces, the children of certain brothers and sisters, during their natural lives, "and after their decease to be equally divided among their children or their legal representatives." The son died without issue, and no nephews or nieces were born after the testator's death. *Held*, that such a nephew or niece born after the testator's death would

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have been entitled to share with the nephews and nieces then living; that the limitation over to the children or legal representatives of the nephews and nieces living at the testator's death was not void for remoteness; and that the possible partial invalidity of the devise in case of the children or legal representatives of any after-born nephew or niece would not defeat the devises to the children or legal representatives of the living nephews and nieces. *Hills* v. *Simonds*, 536.

7. A will contained the following clause: "After payment of my just debts and funeral expenses, I give and devise to my wife one third of all my real estate to her sole use and behoof forever, together with all the furniture or personal property now in the house, and the other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve." The personal estate was insufficient to pay the debts and funeral expenses, and the administrator with the will annexed sold the real estate, and had a sum remaining in his hands after paying such debts and expenses. *Held*, that the wife took an estate in fee in one third of the residue; that, as to the other two thirds, she took at least an estate for life, with a power to convey the fee and to receive the proceeds; that she was entitled to the residue of the proceeds in the administrator's hands, and to use them at her discretion for her support; and that no trust was created by the will in favor of the children. *Gibbins* v. *Shepard*, 541.

See CHARITY; EXECUTOR AND ADMINISTRATOR, 2; TRUST AND TRUSTEE, 4–7.

DISCHARGE.

See JOINT DEBTOR.

DISCONTINUANCE.

See PLEADING, 1; RAILROAD, 3.

DISCOVERY.

See EQUITY, 7.

DISTRICT COURT.

The St. of 1874, *c.* 35, § 17, empowering the First District Court of Southern Middlesex to "appoint all officers necessary for the transaction of the business of the court," does not authorize the appointment of an officer, whose services are to be paid for by the county, to attend the daily sessions of the court for criminal business. *Bannister* v. *Middlesex*, 523.

DOMICIL.

See LIMITATIONS, STATUTE OF.

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DRAIN.

See SEWER.

DRUNKARD.

See OFFICER, 1.

DURESS.

On the issue whether a promissory note was obtained by duress, the judge refused to rule, as requested by the plaintiff, that "if the plaintiff believed that he had a good cause of action against the defendant, and undertook to collect his claim by attachment of property, and the defendant, to get rid of or prevent such attachment, gave the note in question, then there was no such duress as would avoid the note, although the jury should believe that at the time the plaintiff did not have any cause of action;" but ruled that "if the plaintiff had or thought he had a good claim against the defendant, or a doubtful claim, and in pursuance thereof made the attachment of the defendant's property, or threatened to attach, and the defendant gave the note in suit either to settle a doubtful claim or to relieve his property from attachment, or to prevent an attachment, then the consideration of the note was good." *Held*, that the plaintiff had no ground of exception. *Downing* v. *Ely*, 369.

EASEMENT.

1. An easement on the surface of land, established by grant, is lost by a non-user for twenty years, united with an adverse use of the servient estate, inconsistent with the existence of the easement, under a claim of title in fee. *Chandler* v. *Jamaica Pond Aqueduct*, 544.
2. A grant of a right to open a parcel of land, where it may be found necessary for the purpose of laying pipes, and of liberty to keep such pipes therein forever, does not expressly or by implication grant a right to change the location of the pipes after they are once laid. *Ib.*
3. The owner of two adjoining lots of land built a house on each, with a chimney between them, which was built entirely on one lot, but was intended for the use of both houses, and had suitable entrances into it from each house. Afterwards, by simultaneous deeds, he conveyed one lot to A. and the other to B., describing the lots by metes and bounds, with "all rights, easements, privileges and appurtenances to the said land belonging," and with covenants of warranty against all incumbrances made or suffered by the grantor, but containing no reference to the chimney. In an action by A. against B. for taking down the chimney, the jury found that A. could have built a chimney on his own land at a reasonable cost, and returned a verdict for B. *Held*, that if A. had an easement in the chimney, it was one created by implication, as being absolutely necessary to the enjoyment of his estate; and that, on the finding of the jury, no such easement was created. *Buss* v. *Dyer*, 287.

See EXCEPTIONS, 12; RAILROAD, 1; WAY, 1.

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EMINENT DOMAIN.

See DAMAGES, 3–7; RAILROAD, 2, 3; SEWER; WAY.

EQUITY.

I. *Jurisdiction and General Principles.*

1. Equity will charge land, paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank for the amount so used. *National Mahaiwe Bank* v. *Barry*, 20.

2. On a bill in equity by a bank to charge land, alleged to have been paid for in part with money known to have been stolen from the bank, with a trust in its favor to the extent of the partial payment, evidence that a short time before the purchase of the land a son of the purchaser received from the thief, knowing it to have been stolen, about the amount of the partial payment; that the son was a minor, living at home with his parents, and that neither the purchaser nor her husband had sufficient means to make such payment, will warrant a decree in favor of the plaintiff. *Ib.*

3. If a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposit with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which, in payment of his debt, a creditor of the husband may, under the Gen. Sts. *c.* 113, § 2, *cl.* 11, maintain a bill in equity against him and his wife. *Bresnihan* v. *Sheehan*, 11.

4. A. and B., partners in business in D., dissolved their partnership by consent. A. agreed to assume the debts of the firm, and B. agreed in writing to sell to A. all his interest in the assets and good-will of the firm for a certain sum, and "not to manufacture or sell or become engaged in said business, either for myself or others, hereafter in the town of D., under the forfeiture of $1000 to be paid to said A. in case of breach of these conditions." *Held*, that A. was entitled to an injunction to restrain B. from violating his agreement. *Ropes* v. *Upton*, 258.

5. It is no ground for an information in equity by the attorney general to restrain a street railroad corporation from laying its tracks and running its cars in a certain street, under the authority of an order of the board of aldermen of the city of Boston, that the corporation had failed to accept the order by a writing filed with the city clerk within thirty days from the passage of the order, as required by its terms, the information having been filed before the end of such thirty days; and that the tracks as laid did not comply with the order, the variation not being stated, and not appearing to be material or intentional. *Attorney General* v. *Metropolitan Railroad*, 515.

6. A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought

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would not afford the assignee an adequate remedy. *Walker* v. *Brooks*, 241.

7. A bill in equity, by A. and B., copartners, against C. and D., alleged that D. executed to A. and B. a license to use a patented machine, for which they were to pay him certain license fees on rendering true monthly accounts; that at the same time D. made an agreement with A. to pay him for his services, (which he performed,) in introducing the machine to the public, a sum equal to such license fees; that D. had assigned his rights in the license and agreement to C., and A. had assigned his rights under the agreement to A. and B. as copartners; that A. and B. had used the machine, duly rendered accounts to C. and D., paid them therefor a certain sum, and owed and were ready to pay to C. a further sum therefor; that a like sum was due from C. to A. and B.; that A. and B. had demanded of C. that he should pay to them the sum so paid by them, and should set off such further sum due to him against the sum so in equity due to them from him; and that C wholly refused to do so, and threatened to sue them for the further sum due and to set aside and avoid the lease and license, and to seize upon and take possession of the leased machine. The prayer of the bill was for a discovery under oath; for an account of all sums due from A. and B. to C. and D. or either of them, and from C. and D. or either of them to A. and B.; for a set-off of such sums against each other; for an injunction against bringing any suit against A. and B. on account of any claim against them as above stated; and for further relief. *Held*, on demurrer, that the bill could not be maintained, either on the ground of set-off, or for an account, or for relief against forfeiture, or to reach, under the Gen. Sts. *c.* 113, § 2, property not attachable at law, or for discovery. *Ib.*

8. In 1856, the G. company, of which A. was treasurer and B. a director, became hopelessly insolvent. In April, 1862, A. obtained a judgment against the company for about $26,000, upon which execution was issued, levied and satisfied by the sale of its franchise for the term of ninety-nine years to the E. company, which was chartered in March, 1862, and in which A. and B. were stockholders, A. owning at the first issue nearly all the shares of stock. In July, 1862, B., having been authorized thereunto at the annual meeting of the stockholders of the G. company, held in May, 1862, made a conveyance of all its real estate, railroad, franchise, rights and privileges, and the right of redeeming the same to the E. company in consideration of $13,085; and at a subsequent annual meeting of the G. company, held in May, 1865, the conveyance was ratified and confirmed as its free act and deed. In 1866, the B. & W. Railroad Company, under the St. of 1866, *c.* 278, took certain railroad property, "being all the property of the E. company," which had greatly increased in value; and a jury in 1867 assessed the damages for such taking at $536,260, and judgment was rendered for the E. company for $235,566, being the amount of the verdict after deducting certain incumbrances assumed by the B. & W. Railroad Company. In May, 1869, the E. company authorized the conveyance of all its corporate property to the B. & A. Railroad Company, the successor of the B. &

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W. Railroad Company, and such conveyance was duly executed. In 1865, the holder of certain unsecured bonds of the G. company, which were dated January 1, 1850, and became due on July 1, 1855, and were unpaid, brought an action thereon which was still pending, when such holder, in 1869, brought a bill in equity against the above corporations and A. and B., to reach and apply a sum of money in the possession of the B. & A. Railroad Company, and alleged to belong to the G. company, on account of fraud on the part of A. and B., in payment of his bonds. *Held*, that such holder had been guilty of laches and unreasonable delay, and that the bill could not be maintained. *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 490.

See INSOLVENT DEBTOR; TRUST AND TRUSTEE, 4–7.

II. *Pleading and Practice.*

9. An executor, desiring to obtain the instructions of the court, should bring a bill in equity, and not a petition. *Gibbins* v. *Shepard*, 541.

10. Where the owner of a parcel of land employs a broker to sell it for him, and the broker, by fraudulent representations respecting the value of another parcel of land, induces him to make a conveyance of his land to a third person, also a party to the fraud, and to take in exchange the parcel concerning which the representations were made, and the third person conveys the land to a purchaser in good faith, and takes a mortgage to secure a part of the purchase money, a bill in equity by the person so wronged, in which he seeks to obtain an assignment of the mortgage, and restitution in damages, is not, under the Gen. Sts. *c.* 127, § 1, terminated by the death of the plaintiff; and, under the St. of 1865, *c.* 42, his executor may be admitted to prosecute on motion, without a bill of revivor. *Cheney* v. *Gleason*, 166.

11. A decree in equity was entered by a single justice of this court, ordering that one of the defendants should forthwith convey to the plaintiff a certain mortgage and a note secured thereby; that the case should then be referred to a master, to ascertain the amount of damages suffered by the plaintiff, after deducting the value of the mortgage assigned to the plaintiff; and that the defendants should pay the plaintiff the amount of damages, together with the costs of suit, to be taxed by the master. From this decree the defendants appealed, and, pending the appeal, the master proceeded to assess the damages. *Held*, that the merits of the case were not open on the appeal; that the decree was not a final decree, and that the appeal therefrom did not work a stay of proceedings; that the direction that the master should tax the costs was erroneous; and that on the defendant's not producing and assigning the mortgage, the master was justified in assessing damages, without regard to the value of the mortgage. *Ib.*

12. When a case in equity comes before the full court on a bill of exceptions to the ruling of a single judge, instead of on appeal, no question of fact is open. *National Mahaiwe Bank* v. *Barry*, 20.

See FRAUDULENT REPRESENTATION, 2; MORTGAGE, 2; TRUST AND TRUSTEE, 1.

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ESTATES OF DECEASED PERSONS.

See EVIDENCE, 16; EXECUTOR AND ADMINISTRATOR.

ESTOPPEL.

1. A warranty deed, executed by a married woman, in accordance with the power conferred upon her by the Gen. Sts. *c.* 108, § 3, of land in which a third person has a life estate at the time, who afterwards conveys it to the grantor, is binding by way of estoppel upon her and her subsequent grantees, to the same extent as if she were unmarried. *Knight* v. *Thayer*, 25.
2. Under a deed with covenants of warranty, a title afterwards acquired by the grantor enures by way of estoppel to the grantee, as against the grantor and his subsequent grantees. *Ib.*

EVIDENCE.

1. On the question of damages for land taken by a city for a public use, evidence of the distance from the land to certain public places in the city is admissible for the purpose of showing its relation to the thickly settled portions of the city. *Williams* v. *Taunton*, 34.
2. On the issue whether piers in New York are properly constructed, evidence that piers in Boston are similarly constructed may properly be excluded. *Hill Manuf. Co.* v. *Prov. & N. Y. Steamship Co.* 292.
3. On a petition for damages occasioned to the abutters on a street, by reason of raising the grade of the street, evidence that damages had been awarded to abutters other than the petitioners is *res inter alios*, and incompetent as an admission by the city. *Donovan* v. *Springfield*, 371.
4. On the issue whether the owner of land in a city, who builds a party wall under an agreement with the adjoining owner, reciting that "any points respecting the same, which are not herein specifically provided for, shall be decided by the custom in regard to party walls in the said city," is bound to put flues therein for the use of such adjoining owner, an expert may be asked if party walls in that city are "usually constructed with flues for the accommodation of the adjacent estate." *Gorham* v. *Gross*, 232.
5. On a petition for the assessment of damages for the taking of land, the question whether a witness is competent to testify as to the value of the land taken is largely within the discretion of the judge presiding at the trial; and if such a witness is a selectman or an assessor of one town, he may properly be allowed to testify to the value of land taken in another town, near the boundary line between the two towns. *Chandler* v. *Jamaica Pond Aqueduct*, 544.
6. On a petition for the assessment of damages for the taking of land, a witness may be asked, on the question whether he is qualified to testify to the value of the land taken, whether he has not frequently been called as a witness to the value of land in land-damage cases. *Ib.*
7. On a petition for the assessment of damages for the taking of land under a statute authorizing the erection of a dam on the land taken, a witness,

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acquainted with the value of lands in the vicinity, and who is a civil engineer, and has made examinations of dams and waterworks, may properly be allowed to testify to the extent to which the dam, if built to the height allowed by the statute, would injure the remaining land of the petitioner. *Chandler* v. *Jamaica Pond Aqueduct*, 544.

8. An expert, who has testified that the point of drainage of surrounding lands by a filter basin, on land taken for that purpose, may be determined, may be asked if the level has been determined by experiment, at which water stands under soil generally, and may state the results of experiments made by him in his laboratory in proving that fact. *Williams* v. *Taunton*, 34.

9. On the issue of ordinary care by a bailee, if the evidence is conflicting as to the circumstances of the case, a question to an expert, as to the practice and care of others in the same business as the defendant, "under like circumstances," may properly be excluded. *Eastham* v. *Riedell*, 585.

10. On the issue whether goods were purchased by the defendant or a third person, evidence of the plaintiff that he delivered the goods on the defendant's credit is inadmissible. *Walker* v. *Moors*, 352.

11. In an action on a written contract for the purchase of a certain number of "casks" of black lead at so much a pound, oral evidence of the size of casks agreed upon is admissible. *Keller* v. *Webb*, 88.

12. In an action against a married woman for goods sold and delivered to her husband, and used on a farm owned by her, on which she and her husband reside, evidence that she paid a bill for similar goods, bought by her husband during the time covered by the account in suit, is competent on the issue whether the husband acted as her agent in carrying on the farm. *Lovell* v. *Williams*, 439.

13. On the issue whether goods were sold to the defendant or to a third person, evidence of the plaintiff, in explanation of his having at one time made a bill of the goods to the third person, is admissible. *Walker* v. *Moors*, 352.

14. After the arrest of a clerk, nineteen years old, for larceny of his employer's goods, and while out on bail, the employer said to him, "I am satisfied that there are other receivers whom we have not yet discovered. I should like to have you make a clean breast of this matter;" and the clerk thereupon made a confession. *Held*, that the words used by the employer contained no promise or threat; and that the confession was admissible in evidence against the clerk on his trial for the larceny. *Commonwealth* v. *Sego*, 210.

15. In an action for breach of warranty in the sale of a cow, the time of the sale was in dispute, and the defendant was allowed to put in evidence that, in an interview with a witness on a day prior to the time when the plaintiff contended that the cow was sold, the fact that he had then sold the cow to the plaintiff was a subject of conversation, but the witness was not allowed to testify to what was said. *Held*, that the evidence was incompetent, as allowing the defendant to put in his own declaration that he had then sold the cow to the plaintiff. *Whitney* v. *Houghton*, 451.

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16. In an action against an administrator for services claimed to have been rendered his intestate by a woman who, as he contended, had lived in adultery with the intestate, a witness testified that when the widow of the intestate made a claim in the Probate Court for an allowance, the defendant objected to it on the ground that she had deserted her husband several years before his death. *Held*, that this evidence did not authorize the defendant to prove by the witness that the widow, in answer to this objection, said that she left her husband because of his adultery with the plaintiff. *Smith* v. *Slack*, 474.

See BANKRUPT, 8, 9, 11; CARRIER, 2; CONTRACT, 6; DAMAGES, 4; DEVISE AND LEGACY, 3; EQUITY, 2; EXCEPTIONS, 7, 8, 12–15, 17; EXECUTION, 1, 2; FRAUD; FRAUDULENT REPRESENTATION; HUSBAND AND WIFE; INSURANCE, 2, 3; INTOXICATING LIQUORS, 1; LARCENY, 2; MALICIOUS PROSECUTION; MASTER AND SERVANT, 1; OFFICER, 2; PAYMENT, 3; PLEADING, 8, PRINCIPAL AND AGENT, 2; RAILROAD, 9–13; REPLEVIN, 3; SALE, 1; SHIP, 1; TOWN, 2; TRESPASS; TROVER; TRUST AND TRUSTEE, 2; WAY, 7.

EXCEPTIONS.

1. If a judge, after he has concluded his charge to the jury, gives further instructions, they are a subject of exception. *Mooar* v. *Harvey*, 574.

2. If a verdict is improperly rendered in a criminal case, and, for this reason, a motion for a new trial is filed the same day, the order of the court overruling this motion is a decision upon a question of law, which may be brought to this court by a bill of exceptions, under the Gen. Sts. *c.* 115, § 7. *Commonwealth* v. *Tobin*, 203.

3. If a paper is improperly read by a jury or any of them during their deliberations, and, for this reason, a motion for a new trial is duly filed, the order of the Superior Court overruling this motion is a decision upon a question of law, which may be brought to this court by a bill of exceptions. *Munde* v. *Lambie*, 367.

4. A point not taken at the trial is not open upon a bill of exceptions. *Goodnow* v. *Hill*, 587.

5. In an action on a promissory note to recover principal and interest, the defence was that the action was prematurely brought; and, at the trial, the attention of the judge was not called to the question whether interest was due or not. The plaintiff excepted to a ruling directing the jury to return a verdict for the defendant on the ground that the action was prematurely brought. *Held*, that the plaintiff could not in this court contend that the action might be maintained for the interest. *Franklin Savings Institution* v. *Reed*, 365.

6. A general exception to the entire charge of a judge to the jury is irregular, and cannot be sustained. *Curry* v. *Porter*, 94.

7. The admission of evidence, which is excluded as soon as it appears to be incompetent, with a strict caution to the jury not to regard it, affords no ground of exception. *Goodnow* v. *Hill*, 587.

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8. It is within the discretion of a judge to exclude a general question put to a witness, which calls for a mere repetition of his previous testimony. *Coker* v. *Ropes*, 577.

9. A refusal to give an instruction requested, based on facts not appearing in the bill of exceptions, affords no ground of exception. *Ib.*

10. No exception lies to the refusal to give a ruling requested, which is not shown by the bill of exceptions to be pertinent to the issue. *Chandler* v. *Jamaica Pond Aqueduct*, 544.

11. In an action by two persons alleged to be partners, one of the plaintiffs was asked, on cross-examination, against the plaintiffs' objection, whether he was a partner with the other plaintiff named in the writ; whether a third person was his partner; and how much capital he put into the partnership. The jury returned a verdict for the plaintiffs; and they alleged exceptions which did not state the answers to these questions. *Held*, that it did not appear that the plaintiffs had any ground of exception. *Harris* v. *Thayer*, 443.

12. If, at the trial of a petition for damages for land taken by a corporation, under a statute, the judge excludes evidence offered by the respondent, that, by a reservation in a deed, it had an easement in the land taken, and admits evidence that the respondent had the same easement by prescription, and the jury deduct the value of the easement in assessing the damages, the respondent has no ground of exception to the exclusion of the evidence offered. *Chandler* v. *Jamaica Pond Aqueduct*, 544.

13. At the beginning of a trial, the defendant's counsel verbally requested the plaintiff's counsel to produce a bill of sale to the plaintiff, without mentioning its date, and he answered that the plaintiff did not have it in his possession. The presiding judge was of opinion that seasonable notice to produce the original bill of sale had not been given, and excluded secondary evidence thereof. *Held*, that the defendant had no ground of exception. *Bourne* v. *Buffington*, 481.

14. On a petition for damages for land taken by a city in constructing waterworks, the petitioner was asked, on cross-examination, against his objection, "What became of the loam on the land?" He answered that he took some with the consent of the water commissioners. *Held*, that the question and answer were immaterial, and that the petitioner had no ground of exception. *Williams* v. *Taunton*, 34.

15. At the trial together of several petitions for damages, for the taking of separate parcels of land by a city in constructing waterworks, declarations of one of the petitioners, made before the taking, tending to show that the lands in the neighborhood would be benefited by the waterworks, were admitted against the petitioners' objection. *Held*, that although the petitioner making the declarations was at the time a member of the city government, the evidence was admissible against him; and that, as it did not appear that the other petitioners asked to have the declarations restricted to the case of the petitioner making them, no ground of exception appeared. *Ib.*

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16. At the trial of a petition for a jury to assess the damages for the taking of land by the city of Taunton under the St. of 1875, *c.* 217, providing in § 2 that "any person injured in his property" may have his damages assessed "in the same manner as is provided where land is taken for highways," the presiding judge instructed the jury that the petitioner would not be entitled to the whole market value of his land, if they found that, "on the whole, the advantages exceed the injury, if any there is to the remaining lands," which were parcel of the land taken. *Held*, that the petitioner had no ground of exception. *Williams* v. *Taunton*, 34.

17. On a petition for damages occasioned to different lots of land abutting on a street, by reason of raising the grade of the street, one of the petitioners testified, on cross-examination, against the petitioners', objection, that, before the grade of the street was raised, there was standing water on the lots of some of the petitioners; but there was no evidence upon which of the petitioners' lots the water was standing. *Held*, that no error appeared in the admission of this evidence. *Donovan* v. *Springfield*, 371.

See DURESS; EQUITY, 12; LIMITATIONS, STATUTE OF; OFFICER, 2; PAYMENT, 1, 2, 4; PLEADING, 5; RAILROAD, 13.

EXECUTION.

1. The officer's return on a levy of execution upon land is, as against the judgment debtor, conclusive evidence of the competency of the appraisers. *Baker* v. *Baker*, 7.

2. The officer's return on a levy of execution upon two lots of land described them, by reference to the appraisers' certificate, as owned in severalty by the judgment debtor, (whereas in fact his interest was an undivided half as tenant in common with another person,) and as bounded by a road and by land of persons named and as containing one about five acres and the other as containing two acres. In a writ of entry, brought by the judgment debtor against a person to whom the judgment creditor had conveyed one half of the two lots of land, the debtor contended that the levy was void because it failed to describe the land levied upon and the debtor's interest therein as required by law; and offered evidence that the lot described as containing "about five acres" contained twenty acres, and that the lot described as containing "two acres" contained eight acres; and that, at the time of the levy, the creditor, the officer and the appraisers supposed that the debtor owned but one quarter part of each lot, and intended to appraise that interest only. *Held*, that the levy sufficiently described the land; and that the evidence was inadmissible. *Ib.*

3. Under the Gen. Sts. *c.* 103, §§ 33, 34, if two parcels of land, one subject to a mortgage and the other not, are taken on execution as the property of a debtor, it is not incumbent on the appraisers to deduct the mortgage debt; the levy is not invalid because both parcels are appraised together as one estate, and no deduction is made from the appraisal on account of the mortgage; and the fact that the creditor supposed that the mortgage had been

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paid and failed in an attempt to contest its validity does not invalidate the levy on the other lot. *Pettee* v. *Peppard*, 66.

See ACTION, 7; FRAUDULENT CONVEYANCE, 1; JUDGMENT, 2, 3.

EXECUTOR AND ADMINISTRATOR.

1. Under the Gen. Sts. *c.* 98, § 8, an executor is bound to account in the Probate Court for rents of real estate received by him from the time of the death of the testator, and his failure to account for and pay over the same is a breach of his bond, for which he and his sureties are liable; but if he is removed from office, they are not liable for rents collected by him after his removal. *Brooks* v. *Jackson*, 307.

2. A provision in a will charging and binding the real estate of a testator for the payment of legacies, and empowering the executor to sell it to pay such legacies, does not affect the rights of the heirs or devisees in the rents until the power is executed by a sale. *Ib.*

3. In an action on a probate bond, it appeared that A. was duly appointed, by the Probate Court, executor of the will of B.; that afterwards A. was removed for cause, in not rendering an account to the Probate Court, from his office of executor, and an administrator *de bonis non*, with the will annexed, was appointed in his place; that A., in his capacity as executor, received rents of the real estate of B. to a large amount, and made disbursements in reference to the estate; and that, in accordance with a power contained in the will, he made endeavors to sell the real estate. *Held*, that there was nothing in the case to show that the judge before whom it was tried erred in disallowing a claim on the part of A. for compensation for his services as executor. *Ib.*

4. If the estate of a deceased person is represented insolvent, and commissioners are appointed to determine the claims of creditors presented to them, the real estate may, after the expiration of two years from the granting of letters of administration, rightly be ordered by the Probate Court to be sold for the payment of debts, proved before the commissioners within the two years. *Edmunds* v. *Rockwell*, 363.

See EQUITY, 9; GIFT; PLEADING, 2.

FALSE IMPRISONMENT.

See OFFICER, 1.

FOREIGN LAW.

See CONFLICT OF LAWS; DEVISE AND LEGACY, 8; INTOXICATING LIQUORS, 1.

FORFEITURE.

See EQUITY, 7.

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FRAUD.

In an action for goods sold and delivered, the defendant filed a declaration in set-off, alleging that during the two preceding years he had paid the plaintiff for goods according to the weights marked on them by the plaintiff, while the true weights were much less. There was evidence that during the two years the defendant had purchased of the plaintiff a large quantity of goods; that during this period the defendant and his men had noticed an unusual shrinkage in his stock; that after the goods sued for were delivered, and during the month before, the defendant caused to be weighed certain bales of stock sent him by the plaintiff, and found the weight of every bale to be uniformly much less than the weight marked thereon by him; that one of these bales had been in the defendant's storehouse nearly two years, the others having been delivered about the time of weighing; that the defendant could only ascertain the deficiency in the weight of the goods sold him by the plaintiff, save where he weighed them, by estimate from his books and the plaintiff's bills; that one of the defendant's men had noticed that one grade of stock, which fell short, mostly came from the plaintiff; and that for over a year the defendant had no scales, which the plaintiff knew. There was no evidence of any deficiency in weight in stock sold to the defendant by third persons; and the plaintiff offered no evidence to explain the detected deficiencies in weight, or to show that they were accidental or exceptional. The judge refused to rule, as requested by the plaintiff, that the defendant could recover under his declaration in set-off only for such deficiencies as were proved by actually weighing the goods, and that the evidence would not warrant the jury in finding any larger sum in his favor. *Held*, that the ruling was rightly refused. *Harris* v. *Thayer*, 443.

See ACTION, 4; BANKRUPT, 11; EQUITY, 8; REPLEVIN, 2.

FRAUDULENT CONVEYANCE.

1. If a husband conveys land to his wife with a design to hinder, delay and defraud his creditors, and the wife participates in such design, the hay cut on the land is liable to be taken on execution to satisfy the debt of a creditor of the husband, contracted subsequently to the conveyance. *Dodd* v. *Adams*, 398.
2. On the issue whether a sale was in fraud of creditors, no proceedings in insolvency or bankruptcy having been instituted, it is not erroneous to refuse to instruct the jury that if the debtor was in failing circumstances the sale was invalid, or to omit to give any instructions on the effect of insolvency or bankruptcy. *Bourne* v. *Buffington*, 481.
3. In an action by the mortgagee of personal property against the mortgagor's consignee, who, after the date of the mortgage, in good faith received the property and made an advance thereon, the defendant offered to show that the mortgage "was made with intent to defeat and defraud the creditors of the mortgagor, and to keep the property from coming into the hands of such creditors, and that the plaintiff shared in this fraudulent intent;" also

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"that, at the time the mortgage was given, the mortgagor was insolvent, and was indebted to the plaintiff, and the mortgage was made with intent to prefer him, and the plaintiff knew this." *Held*, that a ruling, that the first offer was immaterial, was erroneous. *Blanchard* v. *McKey*, 124.

See BANKRUPT, 7–9.

FRAUDULENT REPRESENTATION.

1. A bill in equity by A. against B., C., D. and E., alleged that, by the false and fraudulent representations of B., a real-estate broker employed by A. to sell his estate for him, A. was induced to make a deed of his land to C., and to take in exchange a worthless equity of redemption in a lot of land owned by D.; that C. and D. were parties to the fraud; that A.'s land was afterwards conveyed to E., a purchaser in good faith, who gave a mortgage back to C. for part of the purchase money. The bill prayed for the assignment of this mortgage to A., for restitution in damages, and for general relief. On issues framed to a jury, there was evidence that B., employed as alleged, and who was also employed by D. to sell his estate, fraudulently misrepresented the value and annual rental of D.'s estate, the character of the house thereon and the neighborhood, and the fact that a responsible person was in want of the place for a hotel; and that A. was thereby induced to make a deed of his land to C., and to take a deed of D.'s land at a much larger price than it was in fact worth; that, while the transaction was pending, C. came with B. to see A.'s place, and B. and C. talked together most of the time; that, after the deeds were passed, C. said that he bought A.'s place through B., and that the understanding was that, when B. found a good chance to trade, he was to let C. know; that D. afterwards admitted that he only received a portion of the difference in price between the valuation of his estate, as expressed in the deed, and that of A.'s estate. The defendants put in no evidence. *Held*, that the evidence was sufficient to warrant a finding in favor of the plaintiff against the defendants B., C. and D.; that the maxim *caveat emptor*, as applied by courts of law to affirmations between a buyer and seller respecting land, did not apply; that as the plaintiff did not seek to rescind, and could not rescind, the entire contract, on account of the sale of his land to a purchaser in good faith, evidence of a settlement with D. for an alleged incumbrance on D.'s land was immaterial. *Held*, *also*, that a request for an instruction that there was no ground for presumption against the defendants from the fact that they produced no witnesses, was properly refused. *Held*, *also*, that, on the question of fraud, evidence of the value of the estates and of the accompanying circumstances was admissible. *Cheney* v. *Gleason*, 166.

2. A suit in equity by A. against B., C. and D. was referred to a master to assess the damages sustained, through the fraud of the defendants, by A., in being induced to sell to one of them a parcel of land, and to take in payment an equity of redemption in a parcel of land owned by D. The master made up the account by charging the defendants with the value of A.'s land, and deducting therefrom the amounts received by A. from rents, and a small

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sum received from a sale of D.'s estate by a mortgagee, after paying the mortgage. The master refused to deduct the value of a watch given by D. to A. in satisfaction of an incumbrance existing on the estate at the time of the sale, which he covenanted against. *Held*, that the deed of D.'s estate and of A.'s estate were properly admitted in evidence; that evidence, offered by the defendants, of the value of D.'s estate was immaterial; and that the value of the watch should have been deducted from A.'s damages. *Cheney* v. *Gleason*, 166.

See EQUITY, 10, 11.

GAMING.

See INDICTMENT, 3, 4.

GIFT.

A., a depositor in a savings bank, delivered her bank book, accompanied by an assignment of her deposits, to B., upon an oral agreement that B. should draw for her what money she wanted during her lifetime, and pay the balance, if any, left at her death to her son. In pursuance of this agreement, B. paid to A. certain sums of money before her death, and the balance remaining after her death he paid to her son, who was appointed executor of her will. *Held*, that the delivery and assignment to B. constituted a valid gift, and that the son was not bound to account as executor for the money so received by him. *Davis* v. *Ney*, 590.

See PLEADING, 2.

GOODS SOLD AND DELIVERED.

See FRAUD; PAYMENT, 3.

GUARANTY.

See CONTRACT, 2.

HEIR.

See EXECUTOR AND ADMINISTRATOR, 2.

HOMICIDE.

See INDICTMENT, 2; VERDICT, 2.

HORSE RAILROAD.

See EQUITY, 5; RAILROAD, 7, 11; WAY, 1.

HUSBAND AND WIFE.

Where a married woman lives with her husband on real estate which is her sole and separate property, there is no presumption of law that the husband is, and that the wife is not, liable for the ordinary expenditures for carrying on the estate. *Lovell* v. *Williams*, 439.

See EQUITY, 3; EVIDENCE, 12; FRAUDULENT CONVEYANCE, 1; MARRIED WOMAN; PAUPER; PLEADING, 1.

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INDICTMENT.

1. An indictment under the Gen. Sts. *c.* 166, § 3, which charges the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery," does not sufficiently describe the substance alleged to have been adulterated, and, if seasonably objected to for that cause, must be quashed. *Commonwealth* v. *Chase*, 202.

2. In an indictment for manslaughter, an averment that the defendant committed the crime "in some way and manner, and by some means, instruments and weapons to the jurors unknown," is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death. *Commonwealth* v. *Martin*, 394.

3. An indictment, on the Gen. Sts. *c.* 161, § 57, which charges, substantially in the words of the statute, that the defendant fraudulently obtained certain property of A. "by means of a game, device, sleight of hand and trick, by the use of cards and other implements and instruments, a more particular description of which said game, device, sleight of hand, trick, implements, instruments and cards, is to said jurors unknown," is sufficient; and is sustained by proof that the defendant used either cards or any other implement or instrument. *Commonwealth* v. *Ashton*, 384.

4. An indictment, on the Gen. Sts. *c.* 161, § 57, charging that the defendant, by means of a game and device, fraudulently obtained of A. "certain moneys, to wit, divers promissory notes, current as money in said Commonwealth," is sustained by proof that the notes obtained by the defendant were bank-bills. *Ib.*

See Assault and Battery; Larceny, 1; Verdict, 2.

INFORMATION.

See Equity, 5.

INSANE PERSON.

See Pauper, 1.

INSOLVENT DEBTOR.

A partner may maintain a bill in equity against his copartner and a third person, to recover his proportion of moneys paid to the defendants by the United States in accordance with a decision of the Court of Commissioners of Alabama Claims, under the U. S. St. of June 23, 1874, for property of the partnership destroyed by an insurgent cruiser, although, after the destruction of the property and before the making of the Treaty of Washington of 1871, the plaintiff was adjudged an insolvent debtor under the laws of this Commonwealth, and all his property was duly assigned to his assignee, if all the debts proved against the plaintiff's estate in insolvency, or existing at the time of the assignment, have been paid, satisfied and discharged, and the assignee has signified his assent in writing to the maintenance of the bill in the name of the debtor. *Jones* v. *Dexter*, 469.

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INSOLVENT ESTATE.

See EXECUTOR AND ADMINISTRATOR, 4.

INSURANCE.

1. A. made an application for insurance against fire to B., an insurance agent, who had authority to issue policies in the R. Company and to bind the W. Company. B. decided to place the risk in the R. Company and wrote a policy, which provided that the insurance might be terminated at any time at the company's option, on giving notice thereof. The R. Company refused to take the risk, but no notice thereof was given to the plaintiff, and B. immediately, without the plaintiff's knowledge, made a memorandum placing the risk in the W. Company; and a loss afterwards occurred on the same day. A. knew that the policy was written in the R. Company before the fire. *Held*, that the policy in the R. Company was in force at the time of the fire; that B. had no authority to rescind the contract without the consent of the parties; and that the W. Company was not liable. *Massasoit Steam Mills* v. *Western Assurance Co.* 110.
2. In an action on a policy of insurance on the property of A., "payable in case of loss to B., mortgagee," containing the condition that if the assured's interest was other than "free and unincumbered," "and is not so expressed in the written portion of the policy, then and in every such case this policy shall be void," it appeared that the property was subject to another mortgage to C., which was not stated in the policy. There was evidence that B. first obtained a policy on his interest as mortgagee from the company's agent, but, on the company's refusal to carry the risk in that form, accepted the policy in question on the assurance of the agent that he would be equally safe. *Held*, that the policy was void; and that the evidence was incompetent, and did not show that any other than A.'s interest was insured. *Fitchburg Savings Bank* v. *Amazon Ins. Co.* 431.
3. In an action on a policy of insurance, by which there is "warranted a family to live in said house throughout the year," evidence that, at the time of the fire and for some time previously thereto, the only occupancy of the insured premises was by two workmen, who took their meals and were employed elsewhere during the day, but kept their trunks and clothing and slept at night in one of the rooms on the insured premises, will not justify the jury in finding that the warranty has been complied with. *Poor* v. *Humboldt Ins. Co.* 274.

INTEREST.

Under the St. of 1867, *c.* 56, § 2, making it lawful to contract to pay a greater rate of interest than six per cent. per annum, and providing that no greater rate "shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing," a person who has paid a greater rate than six per cent. per annum, under an oral agreement, cannot maintain an action to recover back the excess. *Marvin* v. *Mandell*, 562.

See DAMAGES, 7; EXCEPTIONS, 5; MORTGAGE, 4; RAILROAD, 2.

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INTERNATIONAL LAW.

See BANKRUPT, 4.

INTERROGATORIES.

1. Answers to interrogatories, signed and sworn to only by the attorney of the party interrogated, are insufficient under the Gen. Sts. *c.* 129, § 49, requiring such answers to be "in writing, signed by the party and upon his oath." *Harding* v. *Noyes*, 572.
2. It is within the discretion of a judge either to order a nonsuit to be entered at the expiration of the time fixed for answering interrogatories filed under the Gen. Sts. *c.* 129, § 46, or to allow further time; and, from the exercise of such discretion, an appeal does not lie to this court. *Ib.*

INTOXICATING LIQUORS.

1. In an action to recover the price of intoxicating liquors sold in another state, the mere fact that the plaintiff knew, at the time of the sale, that the defendant was a grocer and liquor dealer in this Commonwealth, does not necessarily prove knowledge on the part of the plaintiff that the defendant intended to sell the liquors again illegally. *Frank* v. *O'Neil*, 473.
2. A complaint, charging the defendant with the unlawful sale of liquor on the Lord's day, "not having then and there any license, authority or appointment to make such sale," is supported by proof that the defendant was the agent or bar-keeper of the licensee of the premises on which the sale was made, and that he was not authorized to make such sale; and is not vitiated by the fact that it is not sufficient in form as a complaint for violation of the Lord's-day act, or as a complaint for violation of the provisions of a license. *Commonwealth* v. *Hoyer*, 209.
3. A complaint, charging the defendant with the unlawful sale of liquor on the Lord's day, "not having then and there any license, authority or appointment to make such sale," sets forth the act charged with sufficient formality. *Ib.*

JOINT DEBTOR.

An instrument under seal, given by the indorsee of a note to one of the joint makers, whereby the indorsee acknowledges the receipt of part of the amount of the note, covenants not to sue the maker to whom it is given, and reserves all rights against other parties to the note, does not discharge such parties. *Kenworthy* v. *Sawyer*. 28.

JOINT TENANT.

See TAX, 4.

JUDGMENT.

1. An action by a parent against a corporation, for the loss of services of his child occasioned by an injury to the child through the negligence of a servant of the corporation, is not barred by the fact that the child, by his

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parent as next friend, has already recovered damages against the corporation for the same injury. *Wilton* v. *Middlesex Railroad*, 130.

2. The issuing of an execution for costs only, upon a judgment for damages and costs, does not vacate the judgment; and, in an action on a bond given to dissolve an attachment made in the original action, that judgment cannot be impeached collaterally by the sureties on the bond. *Wood* v. *Mann*, 319.

3. The payment, by the sureties on a bond given to dissolve an attachment, of an execution for costs only, issued upon a judgment recovered against the principal defendant, for which a receipt, but no release under seal is given, operates as a payment *pro tanto* of the judgment, and does not release the sureties from liability to pay the remainder of the judgment. *Ib.*

See ACTION, 1, 4; APPEAL; REPLEVIN, 1; SET-OFF.

JURY.

See EXCEPTIONS, 3; NEW TRIAL; RAILROAD, 3; VERDICT, 1.

LACHES.

See EQUITY, 8.

LAND DAMAGES.

See DAMAGES, 3–7; EVIDENCE, 1, 3, 5–7; EXCEPTIONS, 12, 14–17; RAILROAD, 2, 3; WAY, 2–6.

LARCENY.

1. It is not necessary to prove the time as alleged in an indictment for larceny. *Commonwealth* v. *Sego*, 210.

2. On the trial of an indictment containing five counts, for larceny in a building, of the property of R., it appeared that the defendant had confessed to R. that he had, during the time covered by the indictment, stolen from his shop at different times large quantities of the goods described in the indictment; that some of the larcenies he committed alone, and some were committed jointly with an accomplice, but he fixed no particular occasion of larceny. The accomplice testified that he and the defendant had, for a period of some months, at various times, stolen from the shop such goods as were described in the several counts of the indictment, but he did not fix any particular occasion of larceny. The judge instructed the jury that "if they found from the evidence, including the confession of the defendant, that he had, on five different occasions, within the period covered by the several counts, stolen articles described in the several courts of the indictment respectively, they would be authorized to render a verdict of guilty, and not otherwise." *Held*, that whether there were five distinct larcenies proved was a question of fact for the jury, and was properly submitted to them. *Ib.*

3. A., in accordance with a preconcerted plan with B., who had a valise checked at a railroad station, entered the baggage room of the station, and

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presenting a check corresponding with the one on the valise, obtained permission from the baggage master to place a package in the valise. While the attention of the baggage master was called away by B., A. changed the checks on the valise and a trunk, which was standing underneath the valise, and immediately passed out of the room. By means of this substitution of checks, the trunk was carried to a station other than that intended by its owner. B. went on the same train with it, and on arrival at the station received it, took it with him, and rifled it of its contents. *Held,* that A. was guilty of larceny of the trunk and its contents. *Commonwealth* v. *Barry*, 390.

See EVIDENCE, 14.

LAW AND FACT.

See BANK, 2; RAILROAD, 10–12.

LEASE.

1. A lessor, who, in consideration of the assignment to him, by the lessee, of certain underleases of parts of the demised premises, accepts from the lessee a surrender of the original lease, "but without prejudice to the leases of parts of the premises assigned to him," may maintain an action against a sub-lessee for rent accruing after the assignment. *Beal* v. *Boston Car Spring Co.* 157.
2. A lease to A. contained covenants to pay rent, for use and occupation of the "premises for and as a dry goods and millinery store," and that no assignment of the same should be valid without the consent in writing of the lessor. A. assigned the lease to B. with such consent, and B., with such consent, but without the knowledge of A., assigned the lease to C., to use and occupy the premises as a dye-house office. *Held*, that A. was released from liability to pay rent during C.'s occupation. *Fifty Associates* v. *Grace*, 161.
3. A lease, purporting to be between A. as lessor and a corporation as lessee, was executed by A. and by B. and C., with no words to indicate in whose behalf the two latter signed it or in what capacity. B. and C. were the majority of a committee appointed by the corporation to make a lease, which made a report that it had made this lease for the corporation. The corporation accepted the report, entered under the lease and occupied the premises. *Held*, that the corporation was liable for the rent reserved in the lease, and could not terminate its estate by a notice sufficient to determine a tenancy at will. *Carroll* v. *St. John's Society*, 565.
4. A corporation, occupying a hall under a lease, appointed a committee to wait on A., the lessor, and "to ask for a reduction of the rent of the hall." The committee reported orally that A. said that he could not reduce the rent, but if the corporation would pay a certain sum until a certain date, then the lease should terminate. The corporation voted "that the report of the committee which waited upon A. for a reduction of the rent of this

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hall be accepted." *Held*, that this vote was not an acceptance of A.'s proposition. *Carroll* v. *St. John's Society*, 565.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

See INTOXICATING LIQUORS, 2, 3.

LIMITATIONS, STATUTE OF.

At the trial of an action upon a promissory note, the defence to which was the statute of limitations, the only question was whether the defendant had, within the meaning of that statute, been absent from and residing out of the Commonwealth; and the intention of the defendant was a fact in controversy. The judge instructed the jury that, if the defendant resided out of the Commonwealth, his intention was immaterial; and that, if they were in doubt as to his residence, they might consider his intention as matter of evidence. *Held*, that the instructions were contradictory and insufficient. *Mooar* v. *Harvey*, 574.

See CHARITY; PLEADING, 8.

LORD'S DAY.

See INTOXICATING LIQUORS, 2, 3.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, it appeared that the prosecution was begun by complaint to a police court, upon which the accused was arrested and tried; and that the judge found that there was probable cause to believe the accused guilty of the offence charged, and ordered him to recognize to appear and answer at the next term of the Superior Court; that a recognizance was given, containing the condition that if the accused should personally appear before the Superior Court at the term mentioned, and at any subsequent term "to which the same may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence or order of the Superior Court thereon; and shall abide such final sentence, decree or order," &c., the recognizance should be void; that the records of the Superior Court only showed that, at the term of that court to which the recognizance was returned, the grand jury returned no bill in the case of the accused. Parol evidence was admitted, against the plaintiff's objection, to the effect that the case was continued by the grand jury, on account of the absence of a material witness, and that at the next term of the court the same action was had by the grand jury, for the same reason; and had not for more than a year afterwards been acted upon. *Held*, that the parol evidence was admissible; and that the prosecution had not been so far terminated that the action could be maintained. *Knott* v. *Sargent*, 95.

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2. In an action by A. against B. for malicious prosecution, it appeared that A. was arrested on a warrant issued on a complaint made by B., in which the the latter charged A. with an assault upon him; and that, on the trial of the complaint, B. stated to the court that a mistake had been made by the officer of the court, to whom the complaint was made; and, at the request of B., A. was discharged. B. introduced evidence that, when he made the complaint, he stated, to the officer who issued it, that an assault had been committed by A. upon C., a servant of B.; that he did not read the complaint when he signed it, and did not know that it charged an assault upon himself; and that he had no probable cause of complaint against A., but made the complaint in behalf of C. He then offered to show that an assault had been committed by A. upon C. before he made the complaint; but the judge excluded it. *Held*, that the evidence excluded was competent on the issue of malice. *Ripley* v. *McBarron*, 272.

MANSLAUGHTER.

See INDICTMENT, 2; VERDICT, 2.

MARRIED WOMAN.

1. Under the St. of 1874, *c.* 184, a promissory note, made by a partnership, and indorsed by the wife of one partner for the accommodation of the firm, binds her. *Kenworthy* v. *Sawyer*, 28.
2. Under the St. of 1874, *c.* 184, a promissory note made by a married woman jointly with her husband, the consideration for which was borrowed money paid by her direction to her husband, binds her; and the fact that a portion of such money was previously advanced to the husband, to which the wife subsequently assented, is immaterial. *Goodnow* v. *Hill*, 587.
3. Where a married woman carries on the business of keeping a boarding-house, the debts due to her for board are a part of the property employed in the business, within the meaning of the St. of 1862, *c.* 198, § 1; and, if she fails to file the certificate required by that statute, such debts are liable to attachment by the creditors of her husband. *Dawes* v. *Rodier*, 421.
4. Where a married woman carries on the business of keeping a boarding-house in one town, and there files the certificate required by the St. of 1862, *c.* 198, § 1, and removes to another town, but neglects to seasonably file a new certificate in the latter town, the debts due to her for board furnished in the former town, although protected, while she resides there, by the first certificate, are liable to attachment by the creditors of her husband after her removal and before the filing of a new certificate. *Ib.*

See CONFLICT OF LAWS, 2; EQUITY, 3; ESTOPPEL, 1; EVIDENCE, 12; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. In an action against a corporation for personal injuries occasioned to an employee, there was evidence that the defendant had a machine for drying lumber by steam pressure, consisting of a cylinder made of boiler iron, open

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at one end, to which was attached a rim and a door to be shut when in use; that the cylinder was made to order, but the rim and the door were purchased of a manufacturer; that the door when closed was held firmly in place by an arrangement of levers, screws, bolts and eye bolts; that on the outer edge of the rim, under the edge of the door when shut, was a groove to be filled by a gasket to make the door steam-tight; that the president of the corporation directed its engineer, who had charge of all the engines and machinery, to set up the machine and put it in working order; that the rim with the door attached was properly riveted to the open end of the cylinder, and a gasket was procured and placed in position; and the machine was then examined and tested by official inspectors of steam-boilers, and subjected to a pressure of one hundred pounds to the square inch, and certified to be sound and fit for use, and safe at a working pressure of sixty-six pounds to the square inch; that the engineer found that the gasket was too thin, and, under the test of the inspectors, the cylinder leaked; that he procured another gasket and was engaged in fitting it in its place, when the employee joined him, and was told that he might take hold and help on the boiler, and he did so; that the second gasket was much thicker than the first, and there was difficulty in closing the door so that no steam would escape; that the door was shut twice as closely as possible, but each time, with a pressure of thirty-five pounds of steam, there was a leak; that the engineer then found that there was an unevenness where the ends of the rubber of the gasket lapped together, and made a new adjustment, closed the door, and let the steam on; that at a pressure of twenty pounds there was a slight leak; that the engineer started to let off the steam, when there was an explosion throwing open the door, and causing the injuries complained of. *Held*, that there was no evidence of negligence on the part of the defendant, either in the selection of the machine, or of the servant charged with the duty of putting it in order for use; and that the action could not be maintained. *Morse* v. *Glendon Co.* 282.

2. In an action for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a coppersmith, putting up gutters on a building, while he was, as alleged in the declaration, in the employ of the defendants, the evidence tended to show that the defendants were repairing the building, and employed a skilful carpenter to superintend the whole job; that, when the time came for putting on the gutters, A., one of the defendants, told the carpenter that he wanted a staging put up, and the staging, for the sole purpose of putting on the gutters, was erected under the direction of the carpenter, who used his own brackets to support it; that the brackets were insecurely fastened to the building; that, on the next day, A. ordered the gutters of a coppersmith, and directed him to send a man to put them up; and that the plaintiff was thus sent, and, when he arrived, was directed by A. where to go to work upon the staging, which fell, causing the injuries. *Held*, that the only negligence was that of the carpenter, a fellow-servant, and that the action could not be maintained. *Killea* v. *Faxon*, 485.

See ACTION, 3; RAILROAD, 14.

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MASTER IN CHANCERY.

See EQUITY, 11.

MAXIM.

Caveat emptor. See *Cheney* v. *Gleason*, 166, 175.

MEMORANDUM.

Death of Mr. Justice Thomas, 597.

MISNOMER.

See TRUSTEE PROCESS.

MONEY HAD AND RECEIVED.

1. A purchaser of counterfeit bonds of the United States, in whose possession they are, need not return such bonds before bringing an action to recover back the money paid by him for them. *Brewster* v. *Burnett*, 68.
2. A purchaser of counterfeit bonds of the United States, which are afterwards redeemed by the United States, may bring an action to recover back the money paid by him for them before repaying the United States. *Ib.*

See BANK, 2; BANKRUPT, 4; PLEADING, 6.

MORTGAGE.

I. *Of Real Estate.*

1. A mortgage of a parcel of land to the grantee and his heirs, describing it by metes and bounds, "with the factory buildings standing thereon, with the water-wheel, shafting, belting, machinery, tools and fixtures, contained in said buildings," and containing the usual covenants and habendum, is a mortgage of real estate only. *Allen* v. *Woodard*, 400.
2. A bill in equity to redeem a mortgage alleged that the mortgage and the note secured by it were given without consideration for the accommodation of the mortgagee, by whose false and fraudulent representations they were obtained; and that an assignee of the note and mortgage took them after the maturity of the note in trust for the mortgagee, and under such circumstances as to be affected with all the equities between the original parties. At the hearing before a master, the mortgagor testified that the mortgage was given, not to represent any debt, but only to help the mortgagee to raise money by depositing it as collateral security, while the mortgagee testified that the mortgage was not given him to raise money, but represented the debt due him, which was then settled between them. There was also evidence that, at the time of the assignment, the mortgagor consented that the assignee, who took the note, which was payable on demand, unindorsed, by an assignment without recourse, six months after date, might hold the mortgage instead of the mortgagee. The master found that, although the note was made at the request of the mortgagee and for his accommodation,

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upon his representation that he could obtain money upon it by depositing it as collateral security, yet that the real purpose of the mortgagee in taking it was to obtain security for the debt already due him; that the mortgagor did not know the amount then due from him, and no settlement was made between them, and the note was not given for any ascertained debt; that the actual debt was much less than the mortgage note at its date; and reported the amount due with all the evidence. A decree was entered in accordance with the master's report. *Held*, on appeal therefrom, that the decree must be affirmed. *Newton* v. *Baker*, 80.

See EQUITY, 11; EXECUTION, 3; INSURANCE, 2.

II. *Of Personal Property.*

3. In an action against an officer for the conversion of personal property attached by him on a writ against A., in whose possession the property was, it appeared that the property had been mortgaged by A., and the mortgage assigned to the plaintiff merely to indemnify him against liability as indorser of A.'s note; and that after the attachment, the plaintiff made a written demand upon the defendant as follows: "I hereby demand of you the sum of two hundred dollars, which is the amount due me on" the mortgage (describing it). *Held*, that the demand, though informal, was sufficient. *Bicknell* v. *Cleverly*, 164.

4. A demand, under the Gen. Sts. *c.* 123, § 63, by a mortgagee of a chattel, upon an officer, who had attached the chattel as the property of the mortgagor, stated that the mortgage was given to secure a certain sum, which sum was then due and interest accrued thereon, and gave the date of the mortgage, (which was eighteen days before the date of the demand,) and the place of record. In fact, the rate of interest reserved in the mortgage was seven per cent. *Held*, that this error did not invalidate the demand. *Robinson* v. *Sprague*, 582.

See DAMAGES, 2; TROVER.

NAME.

See TRUSTEE PROCESS.

NATIONAL BANK.

See BANK.

NAVIGABLE WATER.

See RAILROAD, 1.

NEGLIGENCE.

See ACTION, 3; MASTER AND SERVANT; PROMISSORY NOTE, 1; RAILROAD, 4–7, 9–11; SHIP.

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NEW TRIAL.

If a bill of exceptions, allowed by the judge at the first trial of a case, and containing statements material to the issue, is, at the second trial, taken to the jury room and read by the jury or any of them, it is sufficient ground for a new trial; and misconduct by the party, in whose favor the verdict is rendered, need not be shown. *Munde* v. *Lambie*, 367.

See EXCEPTIONS, 2, 3; REPORT, 2, 3.

NONSUIT.

See INTERROGATORIES, 2.

NOTICE.

See POOR DEBTOR.

NUISANCE.

1. A person aggrieved by an order of the state board of health, under the St. of 1871, *c.* 167, § 2, prohibiting his carrying on a certain trade, and adjudging it to be a nuisance, has a right of appeal to a jury, although such right is not expressly given by this statute. *Sawyer* v. *State Board of Health*, 182.
2. A petition for a jury, to "either alter or annul in full" an order of the state board of health, alleged that the petitioner carried on the business of slaughtering, and set forth the order, which directed the discontinuance of the business of "slaughtering and rendering." The jury returned a verdict that they did not affirm the order in full, and made certain "special findings" that the "jury alter the order" by permitting the continuance of the business of "slaughtering" under certain restrictions enumerated, both the verdict and findings being signed by the foreman and affirmed in court. *Held*, that the verdict and findings were sufficiently clear and formal. *Ib.*
3. Under the Gen. Sts. *c.* 26, § 5, providing that a board of health "shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth and causes of sickness," a jury, on appeal from an order of the state board of health prohibiting the business of "slaughtering and rendering" on certain premises, may alter the order by permitting the business of "slaughtering" under restrictions that the cellar under the slaughter-house be concreted in concave form, that no swine be kept in or under the slaughter-house, that all offal and offensive matter be removed from the premises before a certain hour of the day of killing, in covered, water-tight boxes or tanks, and that the premises be kept at all times in a condition of neatness and cleanliness acceptable to the local board of health. *Ib.*

OFFICER.

1. An officer who arrests a person, without a warrant, under the St. of 1876, *c.* 17, on the ground that he is "found in a state of intoxication," is liable to an action for an assault and false imprisonment, if he omits to make a

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complaint against him for the crime of drunkenness; or if the person arrested is not in fact intoxicated, although the officer acts in good faith, and under a reasonable belief that the person is intoxicated. *Phillips* v. *Fadden*, 198.

2. In an action against an officer, who arrested the plaintiff, without a warrant, under the St. of 1876, *c.* 17, there was evidence that while the officer was taking the plaintiff to the lock-up, the plaintiff asked to be let off, and promised the officer that if he would release him, he would go home peaceably; that the officer released him and did not afterwards make a complaint against him. There was also evidence that when the plaintiff was released, the officer told him to be at court the next day; and that the officer then applied for a warrant, but did not obtain one. The judge instructed the jury that, to release the officer from liability, the jury must be satisfied that it was understood and agreed between the parties at the time that no further proceedings were to be taken. *Held*, that the defendant had no ground of exception. *Ib.*

3. If the owner of personal property, which has been attached on a writ against him, and duly sold by a deputy sheriff, makes an assignment of the property "and the proceeds thereof," the title to such proceeds vests in the assignee, subject to the attachment; and if, after dissolution of the attachment, the officer, having been notified of the assignment, and demand having been made upon him by the assignee, fails to pay over such proceeds, it is a neglect of official duty on his part, for which the sheriff is liable in an action by the assignee. *First Ward National Bank* v. *Thomas*, 278.

See ACTION, 7; BANKRUPT, 8; CONTRACT, 4, 5; DISTRICT COURT.

PARENT AND CHILD.

See JUDGMENT, 1; RAILROAD, 7.

PARISH.

See CHARITY.

PARTIES TO ACTION.

See CONTRACT, 8; PLEADING, I.; TRUST AND TRUSTEE, 1.

PARTNERSHIP.

A., with the consent of B., did business in his name, and bought goods of C. and also of D., who both gave credit to B. C. brought an action against B. and attached goods as his property. Subsequently D. brought an action against A., doing business under the name of B., and attached the same goods. C. was then allowed, without notice to D., to amend his writ by adding the name of A. as a defendant, and declaring against A. and B. as copartners doing business under the name of B. Both C. and D. recovered judgments. As between A. and B., the latter had no interest in the attached goods. *Held*, that the goods attached were first to be applied in

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satisfaction of the execution obtained by C. on his judgment; and that the amendment was immaterial. *Wright* v. *Herrick*, 154.

See EQUITY, 4; EXCEPTIONS, 11; INSOLVENT DEBTOR; MARRIED WOMAN, 1.

PARTY WALL.

See ACTION, 2; EVIDENCE, 4.

PATENT.

See EQUITY, 7.

PAUPER.

1. In an action for the support of a pauper, it appeared that the husband of the pauper resided on a freehold estate in the defendant town from January, 1863, to January, 1868; that during the whole of this period he was more than twenty-one years of age; that he was an alien until November, 1864, when he became a naturalized citizen; that in May, 1867, his wife became an insane pauper, and was with his consent committed to the State Lunatic Hospital; and that in January, 1868, he ceased to be a resident of the defendant town. *Held*, that, by the St. of 1868, *c.* 328, § 1, as amended by the St. of 1871, *c.* 379, § 1, the husband of the pauper acquired a settlement in the defendant town. *Endicott* v. *Hopkinton*, 521.

2. The St. of 1868, *c.* 328, § 1, as amended by the St. of 1871, *c.* 379, § 1, relating to the settlement of paupers, is constitutional. *Ib.*

3. After the Prov. St. of 1767, (7 Geo. III.) *c.* 3, § 4, and before the St. of 1789, *c.* 14, no person could gain a settlement by residence in a town for any length of time, although not warned away, without obtaining the approbation of the town at a general meeting. *Malden* v. *Melrose*, 304.

4. In an action by one town against another, for the support of a pauper, it appeared that, by the St. of 1850, *c.* 309, the defendant town was set off from the plaintiff town; that the grandfather of the pauper in 1785 bought an estate of the clear annual income of three pounds in that part of the town which became the defendant town by the division, and resided there until his death in 1831; that his son, the father of the pauper, came to the plaintiff town with his father, and in 1815 moved with his family on to a place which is now in the plaintiff town, and in 1823, bought and moved on to a freehold estate in that part of the town which remained within the limits of the plaintiff town on its division, and resided there continuously with his family, including the pauper, until 1832, when he and his family moved to another town; and that the pauper was absent from the plaintiff town when it was divided, and his last dwelling place in the town was in that part of it which remained the plaintiff town after its division. *Held*, that by the St. of 1789, *c.* 14, the grandfather acquired a settlement by his two years' ownership and residence; that this settlement was derived by the pauper; that the effect of such settlement was not changed by the fact

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of the removal of the father of the pauper to another part of the old town or to another town, and of his absence when the town was divided; and that, by the St. of 1850, *c.* 309, § 3, which provides that the two towns "shall be respectively liable for the support of all persons who now do, or hereafter shall, stand in need of relief as paupers, whose settlement was gained by, or derived from, a settlement gained or derived within their respective limits," the pauper was chargeable to the defendant town. *Malden* v. *Melrose*, 304.

PAYMENT.

1. On the issue whether certain notes were given in payment of another note or as collateral security, there was evidence that such notes were sold, but it did not appear that they were sold before the maturity of the principal debt. The judge instructed the jury that the giving and acceptance of such notes were *primâ facie* evidence of payment, but it was for them to say whether, upon all the evidence, they were received in payment. *Held*, that there was no ground of exception. *Goodnow* v. *Hill*, 587.
2. In an action on a bond given by one partner to another, on the dissolution of the firm, and conditioned that the obligor should pay the debts of the firm and hold the obligee harmless thereon, it appeared that the obligee assigned the bond to the creditors, and, partly before and partly after the assignment, paid certain of the creditors the amount of their debts, some by a check which he borrowed and gave his note for, and some by notes, and that the creditors receipted their bills. *Held*, on the defendant's exceptions, that the notes were to be presumed to be negotiable notes; that, this being so, there was *primâ facie* evidence of payment of the debts; and that the facts that the payments were voluntary and that the bond had been assigned were immaterial. *Amos* v. *Bennett*, 120.
3. In an action for goods sold and delivered, the only issue was payment. The evidence tended to show that the defendant sent the plaintiff the note of a third person indorsed by the defendant, together with his own check for a small amount, in payment, and the same were received by the plaintiff with full knowledge that such was the defendant's intention; that the plaintiff, upon receiving the note and check, indorsed the latter, and sent it with the note to a mercantile agency, with instructions to send the note to its attorney and have the same returned to the defendant, and the plaintiff's account collected; that the agency followed these instructions, but its attorney, instead of returning the note and check as directed, indorsed the latter, deposited it in bank, and it was duly paid, and returned to the defendant in the ordinary course of business; that the attorney lost the note soon after receiving it, but did not inform either the plaintiff or defendant of the loss until after its maturity, and more than four months after its loss, when he wrote the defendant that the note was lost; that the maker of the lost note was able and ready to pay it at its maturity, had he been called upon to do so; that the plaintiff supposed the note had been returned to the defendant; that the defendant was never given a receipt for the account; and that the note in suit was never returned to him, but he supposed that

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the note of the third party and his own check had been received by the plaintiff, in payment of the account and note in suit. *Held*, that the evidence warranted the inference that the attorney was the agent of the plaintiff, for whose neglect he was responsible; that the laches and misconduct of the agent made the note and check the property of the plaintiff, and operated as satisfaction of his demand; and that there was sufficient evidence of payment. *Swett* v. *Southworth*, 417.

4. In an action by a bank against A., the maker of a promissory note indorsed by B., in which the answer was a general denial, it appeared that two days after the maturity of the note, which had been protested for non-payment and the indorser duly notified, the plaintiff charged off a certain balance which stood upon its books to the credit of B., who kept an account there, and shortly after sent him a notice stating this amount to be charged him "for payment of A.'s note;" that in the mean time B. had failed; that, at the time when the balance was charged off, and B. notified of it, the note in suit was the only claim due against B. in the hands of the plaintiff, which, however, held other notes not then due, upon which B. was indorser, to none of which A. was a party; that the plaintiff's officers testified that they did not intend to apply the balance charged off to the note in suit exclusively, but they held it to be applied to any claim against B. to which they had a right to apply it; that at the commencement of bankruptcy proceedings by B., the plaintiff rendered him an account, in which all claims which it then had against him were charged, and all payments received on his account credited; that the first item on the debit side of the account was the note in suit, charged at its full amount, and in the same line, upon the credit side, was the balance which had been charged off; that the dividends in bankruptcy were paid upon the balance due the plaintiff upon this general account. The defendant asked the judge to rule that the plaintiff was bound to apply the balance charged off to the note in suit; and that the defendant was entitled to have it deducted from the amount of the judgment in this action. The judge refused so to rule; found that the plaintiff did not in fact so apply it; and ordered judgment for the plaintiff for a sum which included the balance charged off. *Held*, that the defendant had no ground of exception. *North National Bank* v. *Hamlin*, 506.

See BOND, 4; JUDGMENT, 3; PLEADING, 7; PRINCIPAL AND AGENT, 2.

PERPETUITY.

See DEVISE AND LEGACY, 6.

PLEADING.

I. *Parties to Action.*

1. If, in an action on a joint promissory note against husband and wife, the plaintiff discontinues as to the husband by reason of proceedings in bankruptcy against him and proof of the note against his estate, he is entitled to prosecute his action to judgment against the wife. *Goodnow* v. *Hill*, 587.

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2. In an action at law, brought against a savings bank in the name of the administrator of a depositor, and stated in the declaration to be brought for the benefit of one claiming the deposit by gift of the intestate, such administrator cannot be made a defendant under the St. of 1876, *c.* 203, § 19. *Pierce* v. *Boston Five Cents Savings Bank*, 593.

See CONTRACT, 3; TRUST AND TRUSTEE, 1.

II. *Declaration.*

3. A count in contract for non-delivery may be joined with a count in tort for the misdelivery of goods, if there is doubt as to the legal effect of the facts relied upon to maintain the action. *Mahon* v. *Blake*, 477.

4. In an action of contract, the declaration alleged that the defendants executed a bond to the plaintiff, and set forth a copy of the bond, (which was in the usual form of a bond given by a petitioner to vacate and set aside a judgment, under the St. of 1875, *c.* 33, and executed by one of the defendants as principal and the others as sureties,) and alleged that the judgment described in the condition of the bond was not vacated or set aside; that the principal defendant had not paid or satisfied the judgment or the execution issued thereon; that the judgment remained unpaid and unsatisfied, and that the defendants owed the plaintiff the amount of the judgment. *Held*, that the declaration was upon the bond and not upon the judgment; that objections to the form of the declaration could only be taken advantage of by demurrer; and that exceptions to a ruling that the plaintiff was entitled to recover on the declaration must be overruled, with double costs. *Witt* v. *Potter*, 360.

See CARRIER, 2; TRESPASS.

III. *Answer.*

5. A defendant in an action at law filed an answer containing an answer in abatement and an answer to the merits. The judge overruled the answer in abatement, and ordered the case to be tried on the merits, and a verdict was returned for the defendant. *Held*, that the plaintiff had no ground of exception, the defendant having the right to answer over if the answer in abatement was overruled in matter of law, and it being within the discretion of the judge, under the Gen. Sts. *c.* 129, § 40, to allow him to answer over if it was overruled in matter of fact. *Fisher* v. *Fraprie*, 472.

6. In an action for money had and received, the defendant, under a general denial, may prove that money, admitted to have been received by him, was, by agreement of parties, applied to the payment of advances previously made by him to the plaintiff. *Marvin* v. *Mandell*, 562.

7. In an action of contract on a promissory note and on an account annexed, the defence of payment is open under an answer alleging "that if the plaintiff shall prove the making of the note declared on, or any of the items in the plaintiff's bill of particulars, the same have been fully paid." *Swett* v. *Southworth*, 417.

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8. The St. of 1877, *c.* 163, providing that "any signature to a written instrument declared on or set forth as a cause of action" shall be taken as admitted unless its genuineness is specially denied, does not apply to the signature of a witness to an attested promissory note, required by the Gen. Sts. *c.* 155, § 4, to take the note out of the statute of limitations. *Holden* v. *Jenkins*, 446.

See PROMISSORY NOTE, 3.

POLICE COURT.

See DISTRICT COURT.

POOR DEBTOR.

If the notice of a person's desire to take the oath for the relief of poor debtors, issued by a magistrate having jurisdiction of the subject matter and of the parties, is given before the expiration of seven days from the time of giving a prior notice, the appearance of the creditor before the magistrate, without objection, at the hearing on the second notice, is a waiver of his right to contest the validity of that notice, although the first notice was sufficient in form and service. *McInerny* v. *Samuels*, 425.

See APPEAL; BANKRUPT, 10; REPORT, 1,

POWER.

See EXECUTOR AND ADMINISTRATOR, 2.

PRACTICE.

See INTERROGATORIES.

PRINCIPAL AND AGENT.

1. An agent, who enters into a written agreement with his principal, by which he engages to execute the orders of the latter "to the best of his ability," is bound to carry out such orders according to the terms of his engagement, and is deprived of all discretion as to their execution, or any right to call in question their prudence, provided they are explicit and intelligible, and he is furnished by his principal with the necessary means. *Coker* v. *Ropes*, 577.

2. If a person sells goods to another, who is the agent of an undisclosed principal, and takes the note of the purchaser in ignorance of such fact, the presumption that the note was taken in payment is rebutted, and the seller may resort to the undisclosed principal. *Lovell* v. *Williams*, 439.

See EVIDENCE, 12; LEASE, 3; PAYMENT, 8.

PRINCIPAL AND SURETY.

1. A surety on a bond, given to dissolve an attachment, is not discharged by the plaintiff's being allowed to file, without notice to him, an amended count, which does not change the cause of action, but merely states it more in detail than the original count. *Cutter* v. *Richardson*, 72.

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2. If a general verdict is returned on a declaration containing two counts, one filed after a bond to dissolve an attachment is given, and without notice to a surety thereon, the surety is not discharged, if it appears from the record that the verdict could not have been rendered on this count. *Cutter* v. *Richardson*, 72.

See BOND, 1, 4, 5; JUDGMENT, 2, 3; PROMISSORY NOTE, 3, 4.

PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR, 1, 3, 4.

PROMISSORY NOTE.

1. A. indorsed in blank an unsigned promissory note in the form "we promise to pay to the order of A.," &c., and entrusted it to his clerk with instructions to deliver it to B. upon the latter's signing it with the name of his firm. The clerk delivered it to B. who signed it with his own name only. B. obtained and afterwards erased the signature of C. as an additional maker, and sold the note to D., who bought it in good faith; and it was found as a fact that D. was not guilty of negligence in failing to observe the erasure of C.'s name. *Held*, that D. could maintain an action on the note against A. *Whitmore* v. *Nickerson*, 496.

2. If a person not a party to a promissory note, for a sufficient consideration, places his name on the back of it, after it is due, changes the rate of interest on the face of the note, pays the interest then due, and subsequently pays an instalment of interest at the changed rate, he is liable as an original promisor. *Rodocanachi* v. *Buttrick*, 134.

3. If a joint and several promissory note payable on demand, and signed by A., and by B. as surety, contains an agreement on its face, below the signatures, that A. is not to be compelled to pay the note before a certain time, an action cannot be maintained against the surety before the expiration of that time; and the defence that the action is prematurely brought may be pleaded in bar. *Franklin Savings Institution* v. *Reed*, 365.

4. A payee of a promissory note, signed by a principal and surety, and secured by a mortgage of land from the principal, may maintain an action on the note against the surety, without first exhausting the security. *Allen* v. *Woodard*, 400.

See BANK; DURESS; EXCEPTIONS, 5; JOINT DEBTOR; LIMITATIONS, STATUTE OF; MARRIED WOMAN, 1, 2; PAYMENT; PLEADING, 7, 8; PRINCIPAL AND AGENT, 2.

RAILROAD.

1. A person cannot, by any use of a navigable dock, gain such a right of way therein as will enable him to maintain a claim for damages for its obstruction by a railroad built across it on piles without a draw, whereby vessels are prevented from coming up to his own private dock and wharf. *Thayer* v. *New Bedford Railroad*, 253.

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2. If a railroad corporation takes by its location the exclusive use of a piece of land, leaving other land of the owner on each side of the railroad, he is entitled to damages, with interest from the date of the filing of the location; and the fact that, when the road is constructed, suitable provision is made for the owner to cross and recross the location from one part of his remaining land to the other, and for the drainage and flowage of the part of his land which is cut off, and that he accepts the same and uses it with the understanding between himself and the company that he has a right so to do, is inadmissible in reduction of the damages. *Old Colony Railroad* v. *Miller*, 1.

3. If a railroad corporation is dissatisfied with an award of county commissioners, assessing damages for the taking of land for its railroad, and applies for a jury to assess the damages, it has the right, under the Gen. Sts. *c.* 43, § 41, to discontinue its petition for a jury and accept the award of the commissioners, upon such terms as the court may order; and if it files such discontinuance, the respondent, not having applied for a jury and entered into a recognizance for the payment of costs, in accordance with the Gen. Sts. *c.* 43, § 24, is not entitled to insist upon a trial by jury. *Fall River Railroad* v. *Chase*, 483.

4. A railroad corporation is responsible for an article of personal baggage, kept by a passenger exclusively within his own control, which is lost through the negligence of the corporation or its servants, and without fault of the passenger. *Kinsley* v. *Lake Shore Railroad*, 54.

5. A passenger on a railroad, on leaving the car, in which he was travelling, at a station for the purpose of getting his dinner, inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave it there, that it would be perfectly safe. He left his baggage in the car, and, on his return, found that the car had been detached from the train, and his baggage removed to another car, where he could have a seat. On going to this car, he found only part of his baggage. No notice of the change had previously been given to him. *Held*, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the railroad corporation. *Ib.*

6. If a person, who has made a contract with a railroad corporation for his personal transportation from one place to another, takes a seat in a sleeping-car, and there loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defence to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts. *Ib.*

7. If a child, while riding with due care on the platform of the car of a horse railroad corporation, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the parent of such child may maintain an action against the corporation for the loss of services of the child occasioned by such injury. *Wilton* v. *Middlesex Railroad*, 130.

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8. If a person buys a ticket which entitles him to a passage over a railroad from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterwards, while on his way to the station of another railroad corporation near by, for the purpose of meeting his son, returns to the station which he had left, and is injured while crossing the tracks, through the negligence of the railroad corporation which had sold him the ticket, when he might have crossed the railroad at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence was wilful, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the track, and people have been accustomed to pass from the station on one railroad to that on the other at that point, without objection by the corporation; and although his ticket does not forbid stopping over at B. *Johnson* v. *Boston & Maine Railroad*, 75.

9. In an action by a passenger against a railroad corporation for personal injuries received while in a train on the defendant's road, it appeared that the injury was caused by the train running into another train at a station. The plaintiff testified that the train was running at an unusual rate of speed, and that for several miles before it reached the station it was racing with a train on a parallel road. The defendant, in order to show that the train was running at the usual speed, asked a witness whether the train was running at the usual speed as it approached the station. The judge refused to admit this evidence, unless the defendant also undertook to show that such usual speed was a safe and proper rate of speed, such as was usual upon well-conducted railroads; and the defendant excepted. *Held*, that this evidence should have been admitted. *Worthen* v. *Grand Trunk Railway*, 99.

10. A passenger in the car of a railroad corporation, on approaching the station to which he was going, left his seat and stood beside it, with his hand on the knob or on the edge of the door of the car, which had been open for some time. While he was so standing, the car came into collision with another car, and the passenger was thrown out on the platform and injured. *Held*, in an action by him against the railroad corporation, that the question, whether he was in the exercise of reasonable care, was for the jury. *Ib.*

11. In an action for personal injuries occasioned to the plaintiff through the alleged negligence of the defendant, a horse-railroad corporation, the evidence tended to show that, at the time of the accident, the plaintiff was driving along a street, in the daytime, with the off wheels of his wagon in the outer rail of the defendant's track, at the rate of from four to six miles an hour; that the plaintiff was driving with a taut rein, his feet resting on a platform, built for the purpose, in front of the wagon; that, at the place where the accident occurred, a steam railroad crossed the street at grade with a continuous rail which crossed and cut the track of the defendant, leaving a gap of four or five inches between the thick part of the end of the horse-car rail and the steam-car rail; that the thick part of the defendant's rail, which projected above the level of the top of the rail of the steam railroad, had been cut away so as to allow the wheels of the steam cars to pass

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without obstruction; that the end of the thick part, where it had been cut away, was broken under, and sharper than a right angle; that as the plaintiff was crossing the track of the steam railroad, his off wheels still running in the outer rail of the defendant's track, he pulled up his horse slightly, and attempted to turn off to the right from the defendant's track; that as the horse, after having passed beyond the further rail of the steam-railroad track, stepped with its off fore foot on to the outer rail of the defendant's track, it sprung down about a quarter of an inch, and the plaintiff's off wheel was caught by the end of the same rail; that the wagon was suddenly stopped, and the plaintiff thrown out and injured; and that, immediately after the accident, and, before the wagon had been moved away from the defendant's rail, the rail was found to be raised up six inches or a foot, and resting against the wheel. The plaintiff testified, on cross-examination, that he slackened the speed of his horse about one third when he arrived within ten feet of the railroad crossing; that the horse was trotting all the time; that he had crossed there a dozen times before; that he did not know there was any danger. *Held*, that, on the above evidence, the questions whether the plaintiff was in the exercise of due care, and whether the defendant was negligent, were for the jury. *Cook* v. *Union Railway*, 57.

12. In an action for personal injuries occasioned to the plaintiff's intestate by a collision with one of the defendant's trains at a grade crossing of its railroad, the evidence tended to show that the intestate was driving along a highway from which the defendant's road was visible for about half a mile; that the highway approached the railroad at an angle of sixty degrees; that the intestate was sitting in a covered wagon, about two feet back from the forward end of the covering, and was driving at a smart trot until he reached the immediate vicinity of the crossing; that it was early in the evening and pretty dark, although darkness had not fully set in; that there was a gas-light near the crossing, and a gate, which, when closed to indicate the approach of a train, crossed the highway at the opposite side of the railroad to that from which he was crossing; that just before he reached the track on which the train was running, the gate-keeper employed by the defendant began to close the gate, swung his lantern, and shouted to the intestate to stop; that the latter then reined up his horse and brought him to a full stop; that, immediately after this, the gate-keeper shouted to him to hurry up; that the intestate then started his horse, and before getting across the track was struck by the engine, receiving the injuries complained of; and that the bell on the engine was not rung, or the whistle sounded, as required by law. *Held*, that, on this evidence, the jury would be warranted in finding for the plaintiff; and that a request of the defendant to rule that, if the signals required by law were given, there was no evidence which would warrant a verdict for the plaintiff, was properly refused. *Bayley* v. *Eastern Railroad*, 62.

13. At the trial of an action for personal injuries occasioned to the plaintiff's intestate by a collision with one of the defendant's trains at a grade crossing of its railroad, a witness, who had testified that, at the time of the ac-

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cident, he was near the defendant's gate-house and saw the gate-keeper go out in a hurry to close the gate, and that he was familiar with the gate and its operation, and with the neighborhood of the gate-house over which the gate-keeper must pass to close the gate, was asked by the plaintiff's counsel, "Whether or not, in your judgment, from the time you saw the gate-keeper leave the gate-house until the train went past the gate-house, there was or was not time for the gate-keeper to go and close the gate?" To this the witness replied, "In my best judgment, he had rather short time, though he might have shut it before the train passed." *Held*, that this answer was a statement of his judgment as to the time which elapsed after the gate-keeper left the gate-house before the train passed it; and that the defendant had no ground of exception to its admission. *Bayley* v. *Eastern Railroad*, 62.

14. In an action brought by an employee against a railroad corporation for an injury caused by his head coming in contact with a signal-post by the side of the track, and three feet and eight inches distant therefrom, while leaning outside of the locomotive engine and looking back to get a signal from the conductor, it appeared that the plaintiff knew of the signal-posts, but had not noticed the one in question before the accident, though, before looking back, he had looked ahead and seen no obstruction, and that there were many other structures on the line of the road at the same distance from it. *Held*, that the action could not be maintained. *Lovejoy* v. *Boston & Lowell Railroad*, 79.

REMAINDER.

See DEVISE AND LEGACY, 2, 4–6; TRUST AND TRUSTEE, 4, 6.

REMOVAL OF ACTION.

An action for an injury occasioned to the plaintiff by a defect in a highway, before the St. of 1877, *c.* 234, repealing the Gen. Sts. *c.* 44, §§ 1, 22, took effect, and brought in the Superior Court after the passage of that statute, may be removed by affidavit of the defendant to this court, under the Gen. Sts. *c.* 114, § 8. *Sullivan* v. *Fall River*, 568.

RENT.

See DEVISE AND LEGACY, 3; EXECUTOR AND ADMINISTRATOR, 1–3; LEASE.

REPLEVIN.

1. A judgment in replevin for the plaintiff does not necessarily show that the taking was unlawful. *Whitman* v. *Merrill*, 127.
2. If the rescission of a sale, voidable through the purchaser's fraud, is made after an attachment in good faith of the goods by a creditor of the purchaser, and immediately before a replevin of the goods by the seller, the detention of the goods by the attaching officer is but momentary, for which he is liable only for nominal damages. *Ib.*
3. Testimony of an assignee in bankruptcy that he would not have given up to the purchaser certain goods, sold by the bankrupt before the bankruptcy,

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but remaining in his possession, even if demanded, unless ordered so to do by his counsel, will warrant a jury in finding an unlawful detention of the goods such as will support replevin against him. *Dugan* v. *Nichols*, 576.

See SALE, 2.

REPORT.

1. Questions of law, arising at the trial, in the Superior Court, of charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, may be reported to this court, after verdict, under the Gen. Sts. *c.* 115, § 6. *Morse* v. *Dayton*, 47.
2. A judge of the Superior Court has no authority, under the Gen. Sts. *c.* 115, § 6, at the hearing of a motion for a new trial, to report for the determination of this court a question of law which might have been and was not raised before verdict. *Aldrich* v. *Springfield, Athol, &c. Railroad*, 404.
3. At a trial in the Superior Court the plaintiff had a verdict, and the defendant alleged exceptions to a ruling of the judge upon a piece of evidence, and afterwards moved to set aside the verdict as against evidence and the weight of evidence. The judge, as he stated in his report, overruled this motion for the purpose of reporting the case to this court, and, after reciting the whole evidence as well as the particular exception, concluded his report as follows: "If upon the evidence the action cannot be maintained, or if the exception taken by the defendant is sustained, then the verdict is to be set aside; otherwise, the verdict is to stand." *Held*, that the judge, not having been asked at the trial to rule upon the whole evidence, was not authorized to report to this court the question whether upon the whole evidence the action could be maintained; and that the order overruling this motion should be set aside, and the motion stand for further hearing in the Superior Court. *Ib.*

See BANK, 2.

RESERVOIR.

See TAX, 1, 2.

RETURN.

See EXECUTION, 1, 2.

SALE.

1. Evidence that a purchaser paid the price and took a bill of sale of certain goods pointed out to him by the seller, which were separate and apart from the other goods of the seller, will warrant a jury in finding that the purchaser acquired title to the goods as against the seller, in whose possession they remained. *Dugan* v. *Nichols*, 43.
2. It is no defence to an action of replevin by a seller of property, which he sold and delivered to the purchaser on condition that the right of property should remain in him until the whole of the agreed price had been paid,

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that a third person lent the purchaser part of the money which he paid to the seller, and that the third person, having obtained possession of the property, mortgaged it, and afterwards tendered the agreed price to the seller. *Chase* v. *Pike*, 117.

See EVIDENCE, 10–13, 15; FRAUD; INTOXICATING LIQUORS, 1.

SAVINGS BANK.

See GIFT; PLEADING, 2; TRUSTEE PROCESS.

SCHOOL DISTRICT.

See ASSESSOR; CHARITY; TOWN, 2.

SELECTMEN.

See TOWN, 1.

SET-OFF.

In an action on a judgment recovered by the plaintiff against the defendant, the latter filed a declaration in set-off, alleging that the judgment was assigned by the plaintiff to M., and that he was indebted to the defendant. It appeared in evidence that the plaintiff agreed to sell to M. the judgment declared on, and executed an assignment of it and sent it by express, directing its delivery to M. upon his paying a sum stated; that M. suggested to H. to purchase the judgment, and H. paid the required sum to the expressman, and M. at the same time executed an assignment of the execution to H., who thereupon directed this action to be brought on his behalf in the name of the plaintiff and by his authority; that H.'s purchase of the judgment was in his own interest solely, and M. had never had any right or property in the same, otherwise than as above stated; and that, after the arrangement between M. and H., but before it was consummated, M. was notified by the defendant of the claim declared on in set-off. *Held*, that the demand against M. could not be set off in this action. *Avery* v. *Russell*, 571.

See EQUITY, 7; FRAUD.

SEWER.

1. On a petition for the assessment of damages for the taking of land by the city of Worcester under the St. of 1867, *c.* 106, providing for a system of sewerage for the city, the presiding judge refused to rule that the city had a right of way over the location and a right to keep the location of the sewer free from structures by abutters, but instructed the jury that the city could enter upon the land, make repairs, reconstruct and make such changes as it saw fit, subject to which right the petitioner could use and improve the land as he wished. *Held*, that the petitioner had no ground of exception. *Clark* v. *Worcester*, 226.

2. The assessment by the city of Worcester under § 4 of the St. of 1867, *c.* 106, providing for a system of sewerage for the city, of the benefit to an

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estate from which land is taken for the construction of a sewer, includes such benefit only as is derived in common with the other estates drained thereby; and a peculiar benefit to the estate may be set off by the city in the assessment of the owner's damages for the taking of his land. *Clark* v. *Worcester*, 226.

See WAY, 3.

SHIP.

1. In an action against a carrier for the loss of goods by fire, while the goods were in a steamship at the port of destination, there was evidence that the defendant, a corporation, had a lease of the pier at which the vessel was lying; that the pier for its whole length was covered by a building, owned by the corporation, with ends and sides of pine boards, and the interior of which was open throughout; that in one room was a stove, two feet from a partition, with a stove-pipe running through the ceiling, and with no protection around either stove or pipe; that the fire was first seen coming from that room, and in a very few minutes afterwards caught and wholly consumed the steamship; and that there was no sufficient watch upon the pier or the steamship. *Held*, that the evidence would warrant a finding that the fire was caused by the neglect of the defendant. *Held*, *also*, that the defendant had no ground of exception to instructions to the jury that the question was, not whether any of the servants of the corporation had neglected their duties, but whether the corporation itself had done so; that the corporation was bound to furnish a suitable pier, and to use reasonable care to protect the property entrusted to it against fire; and that if it failed to do so, and the loss was occasioned by such failure, the defendant was liable. *Hill Manuf. Co.* v. *Providence & New York Steamship Co.* 292.
2. Proceedings in a federal court under the U. S. St. of March 3, 1851, exempting ship-owners from any liability for loss by fire, not caused by their own design and neglect, and limiting their liability for losses by other causes without their privity or knowledge to the amount or value of their interest in the ship and freight, and a final decree therein forever debarring all claimants in default from prosecuting their claims for losses, are no bar to an action in a state court, by one who has not submitted himself to the jurisdiction of the federal court, against a ship-owner for a loss by fire of certain goods through his neglect. *Ib.*

See TAX, 4.

STATUTE.

The St. of 1878, *c.* 173, providing that the compensation awarded to auditors by this court or the Superior Court shall be paid by the county, and shall not be taxed in the bill of costs of either party, applies to a case in which final judgment had not been rendered, nor the compensation of the auditor awarded, before the statute took effect, although he had been appointed and had returned his report before that date. *Fessenden* v. *Nickerson*, 316.

See DAMAGES, 3; NUISANCE, 1; PAUPER, 1; REMOVAL OF ACTION.

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STREET RAILWAY.

See EQUITY, 5; RAILROAD, 7, 11; WAY, 1.

SUPERIOR COURT.

See REMOVAL OF ACTION; REPORT.

SUPREME JUDICIAL COURT.

See REMOVAL OF ACTION; REPORT.

SURVEYOR OF HIGHWAYS.

1. In an action of tort against a surveyor of highways for the removal, while acting within the scope of his authority, of earth and gravel from the highway in front of the plaintiff's estate for the purpose of making repairs, the surveyor's judgment as to the necessity of such repairs is conclusive, and his good faith in making them cannot be questioned, whether the repairs are made opposite such estate, or on another part of the way or on another highway within his jurisdiction; and the only remedy is under the Gen. Sts. c. 44, § 19. *Denniston* v. *Clark*, 216.
2. A surveyor of highways, while acting within the scope of his authority, may remove earth and gravel from one highway or part of a highway to another within his jurisdiction. *Ib.*

SURVIVORSHIP.

See EQUITY, 10.

TAX.

1. The St. of 1872, c. 306, relating to the taxation of reservoirs, is unconstitutional, and a tax assessed under it is invalid. *Fall River* v. *County Commissioners*, 567.

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2. If a reservoir company owns merely a right to flow land, this is not an estate liable to taxation. *Fall River* v. *County Commissioners*, 567.
3. A corporation, having a capital stock divided into shares, is not taxable for cash in its treasury. *Ib.*
4. A tax was assessed by a city, on May 1, to five persons jointly, as owners or trustees of a ship. The legal title to the ship was on that day in these persons, in trust to complete the ship and sell her for the benefit of themselves and others having claims against her. All the trustees, on that day, did business in the city, but were not partners, and only three of them resided there. The vessel was at a wharf in the city, at which the trustees had hired a berth, with the right to pass over the wharf to the ship, and to use the part of the wharf near the ship for storage. *Held*, that, although the three resident trustees were liable to taxation for their interests in the vessel, they could not, under the Gen. Sts. *c.* 11, § 12, be jointly taxed with the other trustees; and that the tax was illegal and void. *Stinson* v. *Boston*, 348.

See ASSESSOR.

TIDE WATER.

See RAILROAD, 1.

TIME.

See BANKRUPT, 2; TRESPASS.

TOWN.

1. Under the St. of 1872 *c.* 84, authorizing selectmen of towns to establish drinking troughs within the public highways, the selectmen act as a board of public officers, and not as agents of the town; and a vote of a town, "that the selectmen be instructed to establish a public watering trough" in a certain locality, is irregular and unauthorized; and if, in pursuance of this vote, the selectmen put up a trough, painted of a brilliant color and of such a character as to frighten horses, the town is not liable for an injury solely occasioned thereby. *Cushing* v. *Bedford*, 526.
2. If the record of a town meeting fails to show that a vote, under the St. of 1870, *c.* 196, § 1, to reëstablish the school-district system therein, was a two-thirds vote, the vote is invalid; and the defect is not cured by the following amendment of the record made by the clerk: "I hereby amend the preceding record, from the best of my recollection that the vote to reëstablish the school-district system was passed by two thirds the legal voters present and voting thereon. The two-thirds vote was not so declared by the moderator, nor were the votes on either side counted; but, from my knowledge and recollection, I have no doubt but that the above is according to the truth." *Judd* v. *Thompson*, 553.

See BOND, 4, 5; PAUPER, 1, 3, 4; WAY, 7.

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TRESPASS.

Under a declaration alleging that the defendant placed divers large quantities of wood, coal, refuse bricks, mortar, rubbish, and of impure water, upon the plaintiff's close, and there kept and continued them until the commencement of the action, but not alleging that the trespass was committed on divers days and times, evidence of two distinct and independent trespasses is inadmissible. *Kendall* v. *Bay State Brick Co.* 532.

See RAILROAD, 8.

TRIAL.

See EXCEPTIONS, 13; PLEADING, 5.

TROVER.

In an action for the conversion of parts of an organ, covered by a mortgage conditioned that the mortgagor should not remove the same from his organ factory without the mortgagee's written consent, it appeared that the mortgagee subsequently found such parts in an organ in a church, and informed a committee of the church that he had a mortgage which "included their organ or parts of it, and demanded the property," exhibiting to them the mortgage. They replied that they "knew nothing about it," and refused to do anything. *Held*, that there was no evidence of a conversion. *Ware* v. *Georgetown Congregational Society*, 584.

See ACTION, 4; BANKRUPT, 3.

TRUST AND TRUSTEE.

1. A trustee, appointed by deed, cannot maintain an action at law for an injury to the trust property before he became trustee, whereby the legal title passed to a third person; but the court may allow him to amend by changing the action at law into a suit in equity, under the St. of 1865, *c.* 179. *Loring* v. *Salisbury Mills*, 138.
2. If a trustee has authority to sell personal property only with the consent of the *cestui que trust*, a married woman, and pledges a portion of the property, without such consent, for his own debt, the invalidity of the transaction is not affected by the direction of the *cestui que trust*, (not shown to have been acted on by the trustee,) to pledge such portion for her benefit, or by the assent of the *cestui que trust* to a sale by the trustee of another portion of the trust property; and letters of her husband, not proved to have been known to or authorized by her, cannot affect her rights. *Ib.*
3. If a trustee has, by the terms of the trust, authority only to pay the income to the *cestui que trust* as it accrues, and not by way of anticipation, he has no right to sell the trust property to reimburse himself for advances to the *cestui que trust*. *Ib.*
4. A testator, by his will, gave the residue of his estate, real as well as personal, to two trustees, in trust, after the payment of certain legacies, to pay the annual income, in certain proportions, to his children during their lives,

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and, after their death, to divide the remainder among his grandchildren, with authority to sell and convey all the real estate when, in such manner, at such price, and in such parts and divisions, as to them may seem best and advisable. On a bill in equity, filed nineteen years after the testator's death, by one trustee against the other, for a sale of certain real estate, the judge before whom the case was heard found that the land remaining unsold had fallen in value during the past few years, and was not only wholly unproductive, but the amount of the annual taxes thereon had been paid out of the income of the rest of the trust fund; that there was an irreconcilable disagreement between the two trustees as to the propriety of selling it, though both testified that it could be sold by public auction for a greater sum than that at which it was appraised at the time of the testator's death; and that a reasonable and proper management of the estate and the interest of the *cestui que trust* required a sale of the real estate, and an investment of the proceeds in productive property. *Held*, that the plaintiff was entitled to a decree directing the sale. *Marshall* v. *Caldwell*, 435.

5. A testatrix devised all her property to a trustee to hold in trust for the sole use and support of her husband; to sell or exchange the property and reinvest the proceeds with his consent; to obtain his written receipt or assent for every payment of money or exchange and sale and reinvestment of property; to convey any part or all of the estate to such persons or associations and at such times as he might in writing designate and propose; and empowering the trustee "to relieve himself from trouble and care" by appointing her husband his agent or attorney. *Held*, that the husband took an equitable fee, which he might alienate, and which equity would apply to the payment of his debts. *Sparhawk* v. *Cloon*, 263.

6. A testator, by his will, gave his estate to trustees, with power to change the investment of any portion thereof and of its accretions, in trust to pay a certain annuity to his mother during her life, and, subject to this provision, to apply such portion of the income, as they might from time to time see fit, to the education and maintenance of the son until he should reach the age of twenty-five years, and then to convey the estate, with all accretions thereof, to him in fee; provided that they might in their discretion convey the same or any part thereof to him at any time after his arriving at the age of twenty-one years. If the son should die before reaching the age of twenty-five years, leaving a widow and children, the trustees were to pay half the income to his widow, and to apply so much of the rest as they might from time to time see fit to the education and maintenance of his children, until the youngest child arrived at the age of twenty-one years, and then to convey the whole estate and all accretions thereof, in equal shares in fee, to the survivors of the widow and children and to the issue of any deceased child by right of representation; provided that the same or any part thereof, concerning which the son should have made a will after arriving at the age of twenty-one years, should be disposed of as therein directed. If the son should die leaving no issue or widow, the trustees were to pay the income to the testator's widow for life, and after her death con-

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vey the remainder in fee to certain brothers and sisters of the testator. *Held*, that the son took an interest in the principal, which equity would apply to the payment of his debts. *Daniels* v. *Eldredge*, 356.

7. A testator, by his will, directed his executors to "use their own judgment as to investing the moneys arising from my estate; at the same time I would recommend to them the propriety of keeping at least one half of the same invested on mortgage of unincumbered real estate, as I think well of that kind of security." When a trustee of the estate was afterwards appointed, more than half of the trust fund was invested in United States bonds, and none of it in mortgages of real estate. The trustee, who had experience in making investments for himself and others, including banks in which he was an officer, sold the United States bonds, and invested the greater part of the proceeds in railroad bonds at eighty-five per cent. of their par value, and in a promissory note of an individual secured by pledge of twice its amount of such bonds, after having advised with various persons reputed of good judgment in financial matters, and after having himself made careful inquiries and investigations, the result of which was to satisfy his mind that the investments were safe and prudent ones at the time, and were proper for him to make in his capacity as trustee. The bonds were payable in gold in twenty years, or at the option of the obligor after five years, with interest coupons attached payable semiannually in gold at six per cent., and were secured by a first mortgage upon the franchises and property of three railroad corporations out of this Commonwealth, the whole of whose stock had been actually paid in, in cash, and was equal in amount to the whole of the bonds which had been sold by the trustees to which they were originally issued, and whose roads formed part of a continuous and direct line from Portland in the State of Maine to Ogdensburg in the State of New York, and formed a line of one hundred and twenty-five miles in the State of Vermont, half of which was already complete and in operation, and the rest of which was in the course of completion under very favorable contracts. At the time of the investment, the roads were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability; and the bonds were selling in the market at from eighty to ninety per cent. of their par value, and were regarded as a first class investment, and were purchased by persons of reputed good judgment for permanent investment. The bonds subsequently depreciated greatly in value. *Held*, that the trustee acted with the sound discretion that the law required of him, and should not be charged with the loss. *Brown* v. *French*, 410.

See CORPORATION; DEVISE AND LEGACY, 4, 6, 7; EQUITY, 1–3, 9; GIFT.

TRUSTEE PROCESS.

A writ was made out against S. S., and a savings bank summoned as trustee. The writ was in fact served on S. F. S., and was afterwards amended accordingly. After service of the writ on the bank, and before the amendment, the bank paid to S. F. S. funds in its possession, deposited by him.

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No notice to, or knowledge by, the bank, that S. F. S. was the person intended to be sued, was shown. *Held*, that the bank was not chargeable as trustee. *Terry* v. *Sisson*, 560.

See ASSIGNMENT, 1; BOND, 3; MARRIED WOMAN, 3, 4.

UNITED STATES.

See DEVISE AND LEGACY, 3.

USURY.

See INTEREST.

VARIANCE.

See ASSAULT AND BATTERY; INDICTMENT, 3, 4.

VERDICT.

1. In a case of felony, the verdict must be pronounced by the foreman in open court; and it is not sufficient for the foreman to hand a written verdict to the clerk, and for the latter to read it to the jury, and to tell them to hearken to their verdict as the court has recorded it. *Commonwealth* v. *Tobin*, 203.
2. If an indictment charges the defendant in one count with killing by a certain weapon, and in another count with killing by means and instruments to the grand jurors unknown, and at the trial the killing by the defendant is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count. *Commonwealth* v. *Martin*, 394.

See EXCEPTIONS, 2; NEW TRIAL; NUISANCE, 2, 3; PRINCIPAL AND SURETY, 2.

VOTE.

See LEASE, 4; TOWN, 2.

WAIVER.

See CONVICTION; POOR DEBTOR.

WARRANTY.

See ESTOPPEL; EVIDENCE, 15; INSURANCE, 3.

WATERWORKS.

See EXCEPTIONS, 14, 15.

WAY.

1. A license by municipal authority, under a statute, to a street railroad corporation to reasonably use a highway, is not the appropriation of an additional easement in the highway, which will, without special provision therefor, entitle abutters to compensation; and is constitutional. *Attorney General* v. *Metropolitan Railroad*, 515.

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2. An order of selectmen, accepted by the town, widened a street, referred to a certain plan as showing the "several locations and the amounts of land taken," and awarded damages therefor to the owners. The grade of the street was subsequently changed by another order, as shown upon a certain other "plan and profile." *Held*, that the change of grade was a new and independent proceeding, for which a landowner was entitled to additional damages. *Lane* v. *Boston*, 519.

3. A city laid out a street in 1861, and within two years constructed it, and opened it to public travel, without making its grade conform to that established in the order of location; made repairs thereon nearly every year thereafter; in 1873, laid water pipes, and in 1874, built a sewer in the street, both with reference to the existing grade; and in 1877, changed the grade so as to conform to that fixed in the original order. *Held*, that this change of grade was not a part of the original construction of the street, and that it entitled an abutter to compensation for the injury occasioned thereby. *Cambridge* v. *County Commissioners*, 529.

4. On a petition for damages occasioned to the abutters on a street, by reason of raising the grade of the street, benefits derived from the situation of the petitioners' lands with reference to the street in question, enhancing their value in that regard, are direct and special, and are to be allowed in set-off, although the same benefit may be common to all the property on the street. *Donovan* v. *Springfield*, 371.

5. Upon a trial to assess damages for land taken to widen a street, the jury were instructed that "the benefit to be deducted must be a benefit which is direct and special to the estate of the petitioner, and not a general benefit shared by his estate in common with other estates in the vicinity, and in common with other estates abutting upon the same street, no part of which has been taken for the widening, and this benefit may be direct and special, although other estates upon the same street, similarly situated, were similarly benefited." *Held*, that this instruction was not erroneous. *Cross* v. *Plymouth*, 557.

6. Upon a trial to assess damages for land taken to widen a street, it is within the discretion of the presiding officer, who has given general instructions upon the subject, to refuse to give a special instruction to the jury upon a particular item of alleged benefit to the petitioner's estate. *Ib.*

7. In an action for personal injuries occasioned to the plaintiff by reason of a defect in a highway, there was evidence that there was a hole in the highway into which the plaintiff's carriage entered, and by reason of which it was overturned; that on the side of the road there was a drinking trough, painted of a brilliant red color, and of such a character that it would and did frighten steady horses; and that it frightened the plaintiff's horse, causing him to spring to one side of the road and to strike the defect in the road while so shying, and occasioning the injuries complained of. It was not contended that the carriage would have struck the defect had it not been for the shying of the horse from fright. *Held*, that the evidence would

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justify the jury in finding that the defect in the highway was the sole, direct and efficient cause of the injury. *Cushing* v. *Bedford*, 526.

See EQUITY, 5; EXCEPTIONS, 17; REMOVAL OF ACTION; SEWER, 1; SURVEYOR OF HIGHWAYS; TOWN, 1.

WHARF.

See EVIDENCE, 3; RAILROAD, 1; TAX, 4.

WORDS.

"Confectionery." See *Commonwealth* v. *Chase*, 202.
"Family." See *Poor* v. *Humboldt Ins. Co.* 274, 277.
"May." See *Phillips* v. *Fadden*, 198, 201.
"Promissory Note." See *Commonwealth* v. *Ashton*, 384.
"Shall." See *Phillips* v. *Fadden*, 198, 201.
"Signature." See *Holden* v. *Jenkins*, 446.

WORK AND LABOR.

See ASSIGNMENT, 2; CONTRACT, 3, 6.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. CXVII.

Page 109, 3d line from bottom, for "*Wood* v. *Wood*" read "*Stout* v. *Wood*."

VOL. CXVIII.

Page 23, 11th line from top, for "*Ex parte Carver*" read "*Carver* v. *Jackson*."
Page 267, 11th line from bottom, for "*Brand*" read "*Braiden*."
Page 267, 13th line from bottom, for "*M'Lean*" read "*M'Learn*."
Page 517, 3d line from top, for "*M'Dermott*" read "*M'Dermutt*."

VOL. CXXI.

Page 52, 10th line from top, for "33" read "41."

VOL. CXXII.

Page 31, 9th line from bottom, for "it all" read "it at all."
Page 84, 15th line from top, strike out "if," and after "should" add "not."
Page 84, 18th line from top, strike out "then the deed should be void."
Page 501, 15th line from top, for "differs" read "differ."

VOL. CXXIII.

Page 425, 15th line from top, for "lands" read "goods."
Page 522, insert, at end of case of *Popple* v. *Day*:
"*T. M. Stetson & F. B. Greene*, for the plaintiff.
"*C. W. Clifford & W. Clifford*, for the defendants, were not called upon."

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